In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-7324

CONNOLLY DEVELOPMENT, INC. and UNION BANK,
Appellants,

vs.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF MERCED,
DIAMOND INTERNATIONAL CORPORATION,
Appellees.

On Appeal from the Supreme Court of the State of California

Jurisdictional Statement

November 23, 1976

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Jurisdictional Statement

Appellants appeal from the judgment of the Supreme Court of California, filed on August 31, 1976 and modified on September 29, 1976 denying Appellants' petition for mandate and prohibition, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial federal question is presented.

OPINIONS BELOW

The opinion of the Supreme Court of California, reported at 17 Cal. 3d 803 (modified 18 Cal. 3d 177b), 533 P.2d 637, 132 Cal. Rptr. 477, is attached as Appendix "A".

The opinion of the Court of Appeal of California, Fifth Appellate District, unofficially reported at 116 Cal. Rptr. 191, is attached as Appendix "B".

JURISDICTION

This action was commenced as an original proceeding in the Court of Appeal of the State of California, Fifth Appellate District to restrain appellee superior court from further proceedings in an action pending in said court. The action questioned the validity of the California Mechanics' Lien laws (California Civil Code §§ 3082-3153 [West Official Unannotated ed. 618-48 (1970), Supp. 241-47 (1976)] and the California Stop Notice (Private Work) laws (California Civil Code §§ 3156-3175 [West Official Unannotated ed. 648-57 (1970), Supp. 247-48 (1976)]). These statutes are set forth as Appendix "C" hereto.

The final judgment of the Supreme Court of California was filed on August 31, 1976 (modified September 29, 1976) and notice of appeal filed in that court on November 15, 1976. A copy of the notice of appeal is attached as Appendix "D". The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257(2).

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Rescue Army v. Municipal Court,* 331 U.S. 549, 552-53 (1947); *Bandini Co. v. Superior Court,* 284 U.S. 8, 13-14 (1931); *see Schroeder v. City of New York,* 371 U.S. 208, 211 (1962).

If this court finds probable jurisdiction over this appeal lacking, it is respectfully requested to consider this statement as a petition for writ of certiorari to the Supreme Court of the State of California (28 U.S.C. § 1257(3); *see Burton v. Wilmington Parking Authority,* 365 U.S. 715, 717 (1961)).

QUESTION PRESENTED

The California Mechanics' Lien statutes permit an individual who has provided labor or materials incorporated into a work of improvement of real property to obtain a direct lien on said real property by simply recording a claim of lien in the office of the county recorder in the county where the property is located. The statutes provide for no prior judicial hearing on the lien's validity or other prior judicial scrutiny thereof, nor do the statutes provide for a prompt post-lien hearing.

The California Stop Notice (Private Work) statutes permit an individual who has provided labor or materials to a real property improvement to garnish unexpended construction loan funds held by a real property owner's lender for the owner's benefit, with no prior judicial hearing on the validity of the garnishment, or other prior judicial scrutiny, or prompt post-notice hearing.

The question is presented whether the foregoing lien and garnishment procedures, or either of them, violate the procedural due process requirements of the United States Constitution.

STATEMENT OF THE CASE[a]

"The California mechanics' lien derives from article XX, section 15, of the California Constitution[b] and chapters 1

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a. The following section is extracted from the Califoria Supreme Court opinion, 17 Cal. 3d at 808-10.

b. (Appellants' note) The California constitutional provisions are not self-executing and no challenge is or was raised as to those provisions.

and 2 of title 15, part 4, division 3 of the Civil Code. Under this statutory scheme, materialmen, contractors, subcontractors, and other persons listed in Civil Code section 3110[1] who furnish labor or materials on a work of improvement are entitled to file a mechanics' lien on the property where the improvement is located. To secure a lien, a materialman must file a preliminary notice with the owner, the general contractor and the construction lender within 20 days after furnishing the materials (§§ 3097, 3114), and thereafter record his claim of lien within 90 days of completion of the improvement (§ 3116). If a notice of completion (see § 3093) or notice of cessation of work (see § 3092) has been recorded, the claimant must record his claim of lien within 30 days of such notice (§ 3116).

"Once recorded, the mechanics' lien constitutes a direct lien (§ 3123) on the improvement and the real property to the extent of the interests of the owner or the person who caused the improvement to be constructed (§§ 3128, 3129). The lien is subordinate to recorded encumbrances antedating the commencement of the work of improvement (*Walker v. Lytton Sav. & Loan Assn.* (1970) 2 Cal. 3d 152, 159 [84 Cal. Rptr. 521, 465 P.2d 497]; see § 3134), but takes priority over all subsequent encumbrances (§ 3134). By purchase and recordation of a payment bond, however, the owner or the holder of a subordinate encumbrance may secure priority over mechanics' liens. (See §§ 3138, 3139.) The owner, lender, contractor or subcontractor may also secure the release of any mechanics' lien by purchasing and recording a bond in a sum equal to one and one-half times the amount of the claim. (§ 3143.) The lien terminates

1. Unless another code is cited expressly, all citations to code sections in this opinion [and jurisdictional statement] refer to the [Cal.] Civil Code.

unless the materialman initiates a suit to foreclose the lien within 90 days after recording of the claim of lien (§ 3144.)

"Sections 3156-3172, which provide for the use of stop notices in connection with private construction, grant subcontractors and materialmen an additional remedy, independent of but cumulative to any right to assert a mechanics' lien. (*A-1 Door & Materials Co. v. Fresno Guar. Sav. & Loan Assn.* (1964) 61 Cal. 2d 728, 732 [40 Cal. Rptr. 85, 394 P.2d 829].) After giving 20 days preliminary notice (§ 3160)[c], the materialman may serve a stop notice upon the owner or the construction lender (§§ 3158, 3159). Upon receipt of such notice, the owner must withhold from the general contractor sufficient money to pay the stop notice claimant. (§ 3161.)

"Unlike the owner, the lender may disregard an unbonded stop notice (*Miller v. Mountain View Sav. & L. Assn.* (1965) 238 Cal. App. 2d 644, 661 [48 Cal. Rptr. 278]), but upon receipt of a notice accompanied by a bond equal to one and one-fourth times the amount of claims (§ 3083) the lender must withhold from the unexpended balance of the loan fund a sum sufficient to pay the claim. (§ 3162.) Failure of the owner or lender to withhold money as required by the notice may render him personally liable to the claimant, notwithstanding the absence of privity of contract.

"Although the mechanics' lien may provide adequate protection for materialmen when the owner finances the improvement from his own funds, such liens can be wiped out by the foreclosure of a lender's trust deed. The value of the stop notice lies in the fact that its lien attaches to the

c. (Appellants' note) This is the same preliminary notice which is a prerequisite to a mechanics' lien and must be filed within 20 days after furnishing the labor or materials (§§ 3097, 3160).

unexpended balance of the loan, not to the land, and thus survives foreclosure of the trust deed.[2] The stop notice claimant also acquires a right to the fund superior to that of any assignee from the owner or contractor (§ 3166), and superior to the lender's contractual right to employ unexpended funds to complete the work of improvement (*A-1 Door & Materials Co. v. Fresno Guar. Sav. & Loan Assn., supra,* 61 Cal. 2d 728, 733-735; *Idaco Lumber Co. v. Northwestern S. & L. Assn.* (1968) 265 Cal. App. 2d 490, 496-497 [71 Cal. Rptr. 422]; *Rossman Mill & Lbr. Co. v. Fullerton S. & L. Assn.* (1963) 221 Cal. App. 2d 705, 710 [34 Cal. Rptr. 644].)

"The owner and lender can protect themselves against stop notices by securing and recording a payment bond from the general contractor. (See §§ 3161, 3162, 3235.) The owner, lender, contractor or subcontractor may also secure the release of any stop notice by filing a bond equal to one and one-fourth times the amount claimed in the notice. (§ 3171; see *Frank Curran Lbr. Co. v. Eleven Co.* (1969) 271 Cal. App. 2d 175, 185 [76 Cal. Rptr. 753].) The obligation of the owner or lender to withhold funds terminates unless the claimant files suit to enforce the stop notice within 90 days after expiration of the period for recording claims of lien. (§ 3172.)

"Of significance in view of the constitutional issues presented here is that no state official scrutinizes the basis for an asserted mechanics' lien or stop notice claim prior to the imposition of the lien. The materialman must file his mechanics' lien with the county recorder, but that functionary is not authorized to adjudicate the probable validity

2. See Note, *California's Private Stop Notice Law: Due Process Requirements* (1974) 25 Hastings L.J. 1043-1044, 1049-1050.

of the lien; the stop notice is delivered directly to the owner or lender without intervening official action. Although statutes authorizing stop notices in connection with public works establish a means for speedy adjudication of any dispute (see §§ 3197-3204), no similar provisions appear in the statutory regulations for mechanics' liens or stop notices in private construction.

"In the present case, Connolly Development, Inc. (hereafter Connolly), the owner and developer of a shopping center in the City of Los Banos, entered into a construction contract with Ralph E. Carlsen Construction Co. ("Carlsen"). Connolly arranged a construction loan with Union Bank to finance the improvement. At Carlsen's request, Diamond International Corporation ("Diamond") furnished materials for the shopping center. On February 15, 1973, Diamond, after complying with the preliminary notice requirements, recorded a mechanics' lien for $6,727.84. On February 22, Diamond filed a bonded stop notice in the same amount with the bank.

"Thereafter Diamond filed a timely complaint to foreclose the mechanics' lien and enforce the stop notice. Connolly and the Union Bank demurred on the ground that the mechanics' lien and stop notice violated procedural due process requirements; the court overruled the demurrer." 17 Cal. 3d at 808-10.

Appellants then commenced an original proceeding in the Court of Appeal of the State of California, Fifth Appellate District, petitioning for writs of mandate or prohibition to compel appellee superior court to dismiss the complaint or to restrain further proceedings therein.

Appellants (petitioners below) raised directly the federal constitutional issues presented herein. 116 Cal. Rptr. at 193.

Deeming the matter one of state-wide concern and great public importance, said court of appeal issued alternative writs, and considered the questions on the merits. 116 Cal. Rptr. at 194. After finding state action present in the operation of both statutory schemes, 116 Cal. Rptr. at 195-96, the court concluded that the mechanics' lien laws were not unconstitutional, 116 Cal. Rptr. at 198, but that the stop notice provisions violated federal and state procedural due process. 116 Cal. Rptr. at 200.

Both appellants and appellee Diamond filed petitions for hearing by the California Supreme Court. A plenary hearing was granted on all issues. The court phrased the questions as follows:

> By recording a mechanics' lien, Diamond obtained a lien upon Connolly's land; by filing the stop notice, it acquired a lien upon a fund lent by the Union Bank to Connolly and retained in the bank's hands for payment of construction expenses. Connolly and the bank assert that the imposition of such liens constitutes a taking of their property without due process of law. Resolution of this controversy requires consideration of three issues: (1) Does the recording of a mechanics' lien or the filing of a stop notice constitute a "taking" of a property interest? (2) Is this "taking" a form of "state action" and thus subject to the strictures of the Fourteenth Amendment? (3) Is the manner of the taking a denial of the owner's or lender's right to procedural due process? 17 Cal. 3d at 811.

The four justice majority concluded that while the recording of a mechanics' lien and the filing of a stop notice each constitutes a constitutional "taking", 17 Cal. 3d at 813-14, and that each procedure constitutes "state action" within the meaning of the Fourteenth Amendment, 17 Cal. 3d at 816, neither violates the requirements of procedural

due process. 17 Cal. 3d at 827-28. The court noted: "Our conclution, founded on both state and federal precedent, applies equally to the due process clauses of the federal and state Constitutions." 17 Cal. 3d at 828 n. 27.

The three dissenting justices agreed that a "taking" and "state action" were involved in obtaining both mechanics' liens and stop notices, 17 Cal. 3d at 828, but vigorously and eloquently asserted that both procedures violated federal and state due process. 17 Cal. 3d 828-44.

This appeal ensued.

THE QUESTIONS ARE SUBSTANTIAL

The issues raised herein involve the application of procedural due process, as it has been developed by this court with respect to creditors' remedies in the line of cases from *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) to *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975), to the California mechanics' lien and stop notice provisions. Vital to the California construction industry, the issues are also of national importance. All fifty states have mechanics' lien laws. *See generally* VI *Martindale-Hubble Law Directory* (108 ed. 1976). The stop notice law is more unique, with only five other states providing for this type of garnishment. Note, *California's Private Stop Notice Law: Due Process Requirements,* 25 Hastings L.J. 1043, 1054-57 (1974).

The application of procedural due process standards to the mechanics' lien remedy has not been uniform among the lower courts which have considered this issue. Three federal district courts and the Georgia Supreme Court have upheld the constitutionality of mechanics' lien laws. *Ruocco v. Brinker,* 380 F. Supp. 432 (S.D. Fla. 1974); *Spielman-Fond, Inc. v. Hanson's, Inc.,* 379 F. Supp. 997 (D. Ariz. 1973) *aff'd* 417 U.S. 901 (1974); *Cook v. Carlson,*

364 F. Supp. 24 (D.S.D. 1973); *Tucker Door & Trim Corp. v. Fifteenth Street Co.*, 235 Ga. 727, 221 S.E.2d 433 (1975). Maryland and Connecticut high courts, conversely, have held their mechanics' lien laws unconstitutional. *Barry Properties, Inc. v. Fick Bros. Roofing Co.*, 277 Md. 15, 353 A.2d 222 (1976); *Roundhouse Constr. Corp. v. Telesco Masons Supplies Co.*, 362 A.2d 778 (Conn. 1975), *vacated and remanded for determination of whether the decison rests on independent state ground*, 423 U.S. 809 (1975), *reaff'd on both state and federal grounds*, ... A.2d ..... (Conn. Jan. 21, 1976), *cert. filed*, 44 U.S.L.W. 3630, No. 75-1420.

The California Supreme Court concluded that adequate procedural safeguards exist with respect to the states' mechanics' liens and stop notice statutes. In reaching this result the court held that this court's decision in *North Georgia Finishing, Inc. v. Di-Chem, Inc., supra,* does not control the instant case despite the acknowledged failure of the mechanics' lien and stop notice laws to provide for either pre-lien/garnishment hearings or judicial scrutiny or prompt post-lien/garnishment hearings. 17 Cal. 3d at 807. The court arrived at this result by effecting a balancing of the relative interests of the property owner against the interest of lien or stop notice claimant as suggested by *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974), 17 Cal. 3d at 807; by also finding the summary affirmance of this court in *Spielman-Fond, Inc. v. Hanson's Inc., supra,* indicative of this court's views on the issues presented, 17 Cal. 3d at 818-20; and further by finding that California's non-specific injunction and declaratory relief provisions (California Code of Civil Procedure §§ 525 *et seq.*, 1060 et seq.) provide adequate alternatives to the pre-or post-

lien/garnishment review of the nature suggested by this court's holdings in *Sniadach, Fuentes v. Shevin,* 407 U.S. 67 (1972), *Mitchell* and *North Georgia*. 17 Cal. 3d at 822-23.

The existence of a mechanics' lien remedy in every state and a stop notice remedy in several states, together with the uncertain application of procedural due process to those remedies present substantial federal questions which call for the plenary consideration of this court. The precise questions presented have not been decided by this court. Further, as noted briefly, *ante,* appellants respectfully submit that the California Supreme Court has resolved these issues in contravention of the principles established by the applicable decisions of this court. For these reasons we believe that the Supreme Court has jurisdiction and should order a full hearing on the merits.

1. The Mechanics' Lien Laws and Stop Notice Provisions Permit a Claimant to "Take" Property of the Land Owner/Construction Loan Debtor, Which Taking Is Accomplished Through "State Action."

All seven justices of the California Supreme Court agreed that a constitutional "taking" involving "state action" exists in the operation of the mechanics' lien and stop notice laws. 17 Cal. 3d at 811-16, 828. This determination is fully consistent with those principles as established by this court. *See Goss v. Lopez,* 419 U.S. 565, 576 (1975); *Fuentes v. Shevin, supra,* 407 U.S. at 85-86; *Sniadach v. Family Finance Corp., supra; United States v. Classic,* 313 U.S. 299, 326 (1941); *see also Hall v. Gerson,* 430 F.2d 430, 438-40 (5th Cir. 1970); *Klim v. Jones,* 315 F. Supp. 109, 114-15 (N.D. Cal. 1970); *Barry Properties, Inc. v. Fick Bros. Roofing Co., supra,* 353 A.2d at 227.

The primary issue herein is whether the California mechanics' lien and stop notice laws comport with procedural due process.

2. The Safeguards Required by Mitchell and North Georgia Finishing Are Conspicuously Absent from the California Procedures and Their Absence Is Not Offset by a Claimant's Interest in the Property Seized.

In *Sniadach v. Family Finance Corp., supra,* 395 U.S. at 342, and *Fuentes v. Shevin, supra,* 407 U.S. at 85-86, this court held that, absent exigent circumstances, before a person could be deprived of a property interest, even temporarily, prior notice and a prior hearing to establish probable cause for the deprivation were necessary.

The reach of this rule seemed to exceed its grasp, for in *Mitchell v. W. T. Grant Co., supra,* the court determined that a prehearing deprivation could be accomplished should certain safeguards obtain. Included in the safeguards found adequate by this court were: articulation of the specific facts to establish the grounds for the deprivation; a showing of these facts before a judicial officer who authorizes the deprivation; the filing of a bond to protect against wrongful deprivation; and an imediate post-deprivation hearing to determine probable cause for the deprivation, 416 U.S. at 616, 618. *North Georgia Finishing, Inc. v. Di-Chem, Inc., supra,* reaffirmed the balance struck by *Mitchell* between a pre-deprivation hearing and no such hearing. *North Georgia Finishing* suggested that even the protections such as those found in *Mitchell* may not suffice if the creditor does not have a present interest in the property or if the issues underlying the seizure are not susceptible to uncomplicated documentary proof. *See generally Barry Properties, Inc. v. Fick Bros. Roofing Co., supra,* 353 A.2d at 231; Catz & Robinson, *Due Process and Creditors' Remedies: From* Sniadach *and* Fuentes *to* Mitchell, North Georgia *and Beyond,* 28 Rutgers L. Rev. 541 (1975).

The California procedures in question clearly founder on these constitutional precepts. The mechanics' lien statutes fail to provide the slightest procedural safeguard to a property owner against whom a lien is asserted. The initial claim of lien which establishes the lien is a mere conclusory recitation of an alleged debt; there is no requirement of a statement of any facts which would support the necessity of imposing a lien on the property and thus clouding the property's title and limiting an owner's opportunity to lease, use or dispose of the property. There is not even a requirement of a statement of facts sufficient to show that the alleged debt is in any way a valid claim (§ 3084). At no time is there judicial intervention between the assertion of a claim of lien and the imposition of the lien. Instead, the recordation of the lien is a purely ministerial function of a county employee who is in no way authorized to review the merits of the lien.

Claims of materialmen, prime and subcontractors and all persons performing labor on or bestowing skill or other necessary services on a work of improvement are entitled to a lien upon the owner's property for the value of their services (§ 3110). These lien claims may also be included in the lien claim of the prime or subcontractor of other person having charge of any portion of the work of improvement.

For example, an electrical subcontractor not having been paid by the prime contractor could properly record his claim of lien for the balance owing to him from the prime contractor. The electrician's suppliers, lessors of equipment,

sub-sub-contractors and all other persons or laborers who performed services or supplied materials for the electrician could also file claims of lien for the sums owing to them for the services and materials supplied to the electrician. The owner's property is encumbered with double, triple or more claims of lien, when the total of these many liens are also included in the electrician's lien. This example could be multiplied by every major craft who works on the job.

Finally, there is no provision for the property owner to obtain an expeditious review of the lien at which the lien claimant bears the burden of establishing at least a reasonable basis for the imposition of the lien. The lien claimant need not file a foreclosure action for up to ninety days after the completion of the project (§ 3144). The foreclosure action is entitled to no priority in trial setting and is not subject to even discretionary dismissal for failure to prosecute until two years have elapsed (§ 3147).

The stop notice procedure not only fails to meet the barest requirements of due process, the procedure is a pernicious avoidance of any due process protection whatsoever. The stop notice procedure allows the garnishment of a property owner's use of a fund (*Systems Inv. Corp. v. National Auto. & Cas. Ins. Co.,* 25 Cal. App. 3d 1057, 1061, 102 Cal. Rptr. 378 (1972)), the construction loan in the possession of the construction lender for the benefit of the property owner, without notice, without hearing; without judicial intervention, without even a requirement that the claimant make more than the barest allegation of the existence of a debt. Instead, the claimant is allowed to exercise a form of statutorily authorized and encouraged self-help to freeze a property owner's construction loan account with the same "doubling-up" danger as above described for mechanics' liens. The result is a loss of the use of those funds whether there is the slightest validity to the claimant's claims or not, and without consideration of any legal or equitable defenses the owner may have. Although the deprivation may only be "temporary," this "temporary" condition may last for years. Moreover, the freezing of a portion of the fund may lead to an inability on the part of the property owner to make construction payments to other persons providing work to his property, including persons who may have been retained as substitutes for the claimant if the claimant has not adequately performed, thus leading to additional claims by third parties against the owner; the ultimate result may be the imposition of additional mechanics' liens and stop notices.

In analyzing these statutes the California Supreme Court concluded that, as in *Mitchell,* the lien or stop notice claimants had an interest in the property liened or construction fund garnished and that this interest when balanced against the "minimal deprivation" of the owner's property "tips in favor of the worker and materialman." 17 Cal. 3d at 825.

The conclusion that the workman or materialman has an "interest" in the property seized short circuits the very purpose for which a due process hearing is intended. As noted by Justice Richardson, writing for the dissenting California justices,

> [I]t may be noted the majority's principal thesis, that the laborer or materialman has "acquired an interest" in the property by enhancing its value, assumes a fact which is "not in evidence." . . . [T]he majority decide, ipse dixit, the very issue which the due process hearing is intended to resolve. 17 Cal. 3d at 840.

In *Mitchell,* the Louisiana vendors' lien statute created a reversionary-secured party interest in the property subject

to seizure from the outset of the debtor-creditor relationship between the parties. 416 U.S. at 604. In a mechanics' lien or stop notice situation, the owner and claimant need not even be in privity of contract (§§ 3085, 3110). The "interest" of the lien or stop notice claimant under the California statutes is far more ephemeral than that possessed by the secured creditor in *Mitchell,* yet the lien and stop notice laws fail to provide the *Mitchell* safeguards of prior judicial participation and early post-taking hearing. 17 Cal. 3d at 841 (dissent). Although due process is flexible and requires an analysis of the governmental and private interests affected, *Mathews v. Eldridge,* ....U.S....., 47 L.Ed.2d 18, 33 (1976), such due process safeguards should not be balanced or accommodated out of existence.

3. This Court's Summary Affirmance in Spielman-Fond, Inc. v. Hanson's, Inc. Does Not Provide Adequate Precedent for Resolution of the Issues Presented Herein.

In May, 1974 this court affirmed, without opinion or plenary hearing, the case of *Spielman-Fond, Inc. v. Hanson's, Inc., supra.* That case upheld the constitutionality of the Arizona mechanics' lien laws. The majority of the California justices concluded that the decision of this court provided yet another ground for the result they reached. 17 Cal. 3d at 819-20.

Spielman-Fond should not preclude consideration of this case on its merits. As Chief Justice Burger has observed:

> When we summarily affirm, without opinion, the judgment of a three-judge District Court we affirm the judgment but not necessarily the reasoning by which it was reached. [Fn. omitted.] An unexplicated summary affirmance settles the issues for the parties, and is not to be read as a renunciation by this Court of doctrines previously announced in our opinions after full argument. Indeed, upon fuller consideration of an issue under plenary review, *the Court has not hesitated to discard a rule which a line of summary affirmances may appear to have established.* [Citations.] *Fusani v. Steinberg,* 419 U.S. 379, 391-92 (1975) (Burger, C.J., concurring) (emphasis added).

See Edelman v. Jordan, 415 U.S. 651, 670-71 (1974); 17 Cal. 3d at 831-32 (Richardson, J., dissenting).

Spielman-Fond was also decided *prior* to this court's decision in *North Georgia Finishing* and its precedental value must be weighed in the context of that case. As appellants have already demonstrated, *supra,* at p. 12-16, none of the safeguards present in *Mitchell* and found absent in *North Georgia Finishing* exist in the statutory schemes presented here for review.

Both state courts which considered their lien laws to be unconstitutional did so with *Spielman-Fond* and *North Georgia Finishing* before them. *Barry Properties, Inc. v. Fick Bros. Roofing Co., supra; Roundhouse Constr. Corp. v. Telesco Masons Supplies Co., supra.* Further, *Spielman-Fond* did not reach the issue of whether Arizona's procedural safeguards were adequate since the district court found that any "taking" occasioned by a mechanics' lien was *de minimis.* 379 F. Supp. at 999. *Spielman-Fond* does not address in any manner the validity of a statutory scheme akin to California's stop notice laws. For these reasons appellants respectfully submit that the California Supreme Court's reliance upon *Spielman-Fond* was misplaced and that the uncertainty created thereby further indicates the substantial nature of the federal questions presented by this appeal.

4. The Non-Specific California Injunction and Declaratory Relief Remedies Are Not Adequate Alternative Safeguards Against the Due Process Deficiencies of the Mechanics' Lien and Stop Notice Laws.

The California majority found solace for the property owner and construction loan borrower in the California Code of Civil Procedure sections dealing with preliminary injunctions (§§ 525 *et seq.*) and declaratory relief (§§ 1060 *et seq.*) and held that these sections provided adequate alternative protection to provisions within the lien or stop notice laws for a pre-lien/garnishment hearing, or for judicial scrutiny prior to imposition of a lien or stop notice or an opportunity for a prompt post-lien/garnishment hearing. 17 Cal. 3d at 822-23.

In *Fuentes,* this court found inadequate a provision in the Pennsylvania replevin law that granted the debtor whose property was seized a right to an immediate post-seizure hearing, *if that debtor instituted the lawsuit leading to the hearing.* 407 U.S. at 77. In *Mitchell,* the post-seizure hearing was adequate because it *was* available to the debtor without institution of an independent action and because the burden of proving the facts setting up the right to a writ was upon the creditor. 416 U.S. at 606, 610. In setting aside the statutes at issue in *North Georgia Finishing,* this court emphasized the absence of any *express* hearing provision in the Georgia garnishment law, 419 U.S. at 607, and did not indicate that Georgia's general injunctive or declaratory relief laws might be adequate substitutes for the type of procedure present in *Mitchell. See* 419 U.S. at 613 (Powell, J., concurring).

As a practical matter the type of relief suggested by the California majority simply does not exist under the injunction and declaratory relief statutes. As Justice Richardson observed:

> Even, however, were we to assume that general injunctive or declaratory relief laws furnished the debtor with an alternative to an express hearing, these remedies would be wholly inadequate substitutes for the unqualified right to an early hearing guaranteed by due process principles. First, in order to obtain any immediate relief under these general laws, the debtor is required to hire an attorney, prepare, file and serve a civil complaint, issue and serve summons, obtain and post an injunction bond (Code Civ. Proc., § 529) and cause to be issued and served the requisite restraining order or order to show cause, the latter procedures substantially equivalent to the release-of-garnishment condemned in *North Georgia.* In addition to his attorney's fees the debtor must pay the filing fees and the premium for the bond. 17 Cal. 3d at 837.

Injunctive relief becomes an even more illusory remedy when consideration is given to the fact that an injunction under California law is only a *remedy* and not an independent cause of action. 3 B. Witkin, *California Procedure* 2306 (2 ed. 1971). An independent wrong or tort must be alleged to support an injunction, yet California courts have held that no action for slander of title lies for a wrongfully recorded lis pendens, *Albertson v. Raboff,* 46 Cal. 2d 375, 295 P.2d 405 (1956), upon a rationale that is equally applicable to the recordation of a mechanics' lien. 46 Cal. 2d at 37?; *see also Annot.,* 39 A.L.R. 2d 840 (1953).

The declaratory relief remedy is similarly illusory. Although such actions are granted a priority in trial setting by California Code of Civil Procedure § 1062a, the burden of initiating the litigation and the burden of proof remain upon the person suffering the deprivation. This procedure is vastly different than the type approved in *Mitchell* and more closely akin to that condemned in *Fuentes.* The "speed" at which a declaratory relief action can be heard

is subject to the debtor's filing of a complaint, service thereof and lapse of the thirty day period in which the lien claimant has to file a responsive pleading. Cal. Code of Civil Procedure § 412.20. Only then can a hearing on the merits be requested. Cal. Rules of Court 206.

The post-seizure hearing held constitutionally adequate in *Mitchell* was explicitly established by the sequestration statute at issue therein. The statute placed the burden on the creditor to establish the reasonable probability that he would prevail on the merits, and the hearing was held within *days* after the seizure. The remedies which the California Supreme Court has held to provide an adequate alternative to this type of hearing are deficient in all these respects. An important federal question is raised with respect to the constitutional validity of such an alternative.

Appellants submit that the Supreme Court of California erred in sustaining the California mechanics' lien and stop notice (private work) statutes in light of the procedural due process requirements of the United States Constitution. The questions presented by this appeal are substantial and of national public importance.

Respectfully submitted,

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(Appendices Follow)

Appendix A

17 Cal.3d 803 as modified 18 Cal.3d 177b

Supreme Court
FILED Aug 31 1976
G. E. Bishel, Clerk
..... Deputy

In the Supreme Court of the State of California
In Bank

Connolly Development, Inc., et al., Petitioners, v. The Superior Court of Merced County, Respondent; Diamond International Corporation, Real Party in Interest.	S.F. 23225

[806] This petition for mandate and prohibition challenges the constitutionality of California's mechanics' lien and stop notice laws on the ground that these laws permit the recording of a mechanics' lien and the filing of a stop notice without a prior hearing and without adequate provision for a prompt post-lien hearing. Although we recognize that the imposition of these liens constitutes the "taking" of a significant property interest by means of state action, we shall point out that the "taking" permitted by the mechanics' lien and stop notice laws conforms to the requirements of procedural due process.

Following the reasoning of recent United States Supreme Court decisions, we must, in resolving the procedural due process issue in question here, carefully define and analyze

the competing interests of the "debtor," the "creditor" and the public generally, in the specific "taking" [807] encompassed by the statutory provisions; we must determine whether the procedure afforded by the legislative provisions reasonably accommodates the competing interests involved.

As to the interest of the owner whose property is subject to a mechanics' lien, we shall explain that he suffers only a minor deprivation by reason of the lien since he retains possession and use of the land; the owner whose account is subject to a stop notice suffers only the encumbrance of the very funds he has previously allocated for the exclusive purpose of paying construction costs. Moreover, the owner enjoys a variety of measures by which he can protect himself against the impact of such a lien, most notably the requirement that the mechanic must file a preliminary notice before filing or recording his lien, thus affording the owner opportunity to take legal steps against any impositions of an improper lien.

As to the worker whose labor has gone into the property, we point out that he would suffer a major deprivation by the abolition of the lien. Without recourse to prevent the owner from the disposition of the property, or to bar the dissipation of loan funds allocated to the payment of construction costs, the worker would be left with only an unsecured and potentially uncollectible claim for compensation for labor that has enhanced the value of the property itself.

We explain that the decision of the United States Supreme Court in North Georgia Finishing Inc. v. Di-Chem, Inc. (1975) 419 U.S. 601, does not control the instant case; that decision is but one of an array of recent decisions holding that identification of the dictates of procedural due process depends upon an accommodation of the governmental and private interests involved. Although *North*

Georgia struck down a Georgia garnishment statute which provided insufficient protection for the interest of the debtor in the seized property, we conclude that because of the unique characteristics of the mechanics' lien and stop notice laws as to both laborer and property owner, and the presence of safeguards in the California laws absent from the Georgia garnishment law, a reconciliation and accommodation of the competing interests in the present case impels the validation of the statutory provisions.

In support of that conclusion we point out that the incursion of the interests of the owner is slight; on the other hand, the loss of the protection of the statutes to the worker would be great. The California [808] Constitution explicitly recognizes the importance of the protection of the claims of the mechanic and materialmen; no other "creditor remedy" in this state enjoys such a constitutionally enshrined status. Thus, the mechanics' lien and stop notice law comply with the requirements of procedural due process.

1. Derived from the California Constitution, the mechanics' lien is elaborated in detailed statutory provisions; similar provisions set forth the stop notice.

The California mechanics' lien derives from article XX, section 15, of the California Constitution and chapters 1 and 2 of title 15, part 4, division 3 of the Civil Code. Under this statutory scheme, materialmen, contractors, subcontractors, and other persons listed in Civil Code section 3110[1] who furnish labor or materials on a work of improvement are entitled to file a mechanics' lien on the property where the improvement is located. To secure a lien, a mate-

1. Unless another code is cited expressly, all citations to code sections in this opinion refer to the Civil Code.

rialman must file a preliminary notice with the owner, the general contractor and the construction lender within 20 days after furnishing the materials (§§ 3097, 3114), and thereafter record his claim of lien within 90 days of completion of the improvement (§ 3116). If a notice of completion (see § 3093) or notice of cessation of work (see § 3092) has been recorded, the claimant must record his claim of lien within 30 days of such notice. (§ 3116.)

Once recorded, the mechanics' lien constitutes a direct lien (§ 3123) on the improvement and the real property to the extent of the interests of the owner or the person who caused the improvement to be constructed (§§ 3128, 3129). The lien is subordinate to recorded encumbrances antedating the commencement of the work of improvement (Walker v. Lytton Sav. & Loan Assn. (1970) 2 Cal.3d 152, 159; see § 3134), but takes priority over all subsequent encumbrances (§ 3134). By purchase and recordation of a payment bond, however, the owner or the holder of a subordinate encumbrance may secure priority over mechanics' liens. (See §§ 3138, 3139.) The owner, lender, contractor or subcontractor may also secure the release of any mechanics' lien by purchasing and recording a bond in a sum equal to one and one-half times the amount of the claim. (§ 3143.) The lien terminates unless the materialman initiates a suit to foreclose the lien within 90 days after recording of the claim of lien. (§ 3144.) [809]

Sections 3156-3172, which provide for the use of stop notices in connection with private construction, grant subcontractors and materialmen an additional remedy, independent of but cumulative to any right to asset a mechanics' lien. (A-1 Door & Materials Co. v. Fresno Guar. Sav. & Loan Assn. (1964) 61 Cal.2d 728, 732.) After giving 20

days preliminary notice (§ 3160), the materialman may serve a stop notice upon the owner or the construction lender (§§ 3158, 3159). Upon receipt of such notice, the owner must withhold from the general contractor sufficient money to pay the stop notice claimant. (§ 3161.)

Unlike the owner, the lender may disregard an unbonded stop notice (Miller v. Mountain View Sav. & Loan Assn. (1965) 238 Cal.App.2d 644, 661), but upon receipt of a notice accompanied by a bond equal to one and one-fourth times the amount of claims (§ 3083) the lender must withhold from the unexpended balance of the loan fund a sum sufficient to pay the claim. (§ 3162.) Failure of the owner or lender to withhold money as required by the notice may render him personally liable to the claimant, notwithstanding the absence of privity of contract.

Although the mechanics' lien may provide adequate protection for materialmen when the owner finances the improvement from his own funds, such liens can be wiped out by the foreclosure of a lender's trust deed. The value of the stop notice lies in the fact that its lien attaches to the unexpended balance of the loan, not to the land, and thus survives foreclosure of the trust deed.[2] The stop notice claimant also acquires a right to the fund superior to that of any assignee from the owner or contractor (§ 3166), and superior to the lender's contractual right to employ unexpended funds to complete the work of improvement (A-1 Door & Materials Co. v. Fresno Guar. Sav. & Loan Assn., *supra,* 61 Cal.2d 728, 733-735; Idaco Lumber Co. v. Northwestern S. & L. Assn. (1968) 265 Cal.App.2d 490, 496-497; Rossman Mill & Lbr. Co. v. Fullerton S. & L. Assn. (1963) 221 Cal.App.2d 705, 710.)

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2. See Note, *California's Private Stop Notice Law: Due Process Requirements* (1974) 25 Hastings L.J. 1043-1044, 1049-1050.

The owner and lender can protect themselves against stop notices by securing and recording a payment bond from the general contractor. (See §§ 3161, 3162, 3235.) The owner, lender, contractor or subcontractor may also secure the release of any stop notice by filing a bond equal to [810] one and one-fourth times the amount claimed in the notice. (§ 3171; see Frank Curran Lbr. Co. v. Eleven Co. (1969) 271 Cal.App.2d 175, 185.) The obligation of the owner or lender to withhold funds terminates unless the claimant files suit to enforce the stop notice within 90 days after expiration of the period for recording claims of lien. (§ 3172.)

Of significance in view of the constitutional issues presented here is that no state official scrutinizes the basis for an asserted mechanics' lien or stop notice claim prior to the imposition of the lien. The materialman must file his mechanics' lien with the county recorder, but that functionary is not authorized to adjudicate the probable validity of the lien; the stop notice is delivered directly to the owner or lender without intervening official action. Although statutes authorizing stop notices in connection with public works establish a means for speedy adjudication of any dispute (see §§ 3197-3204), no similar provisions appear in the statutory regulations for mechanics' liens or stop notices in private construction.

In the present case, Connolly Development, Inc. (hereafter Connolly), the owner and developer of a shopping center in the City of Los Banos, entered into a construction contract with Ralph E. Carlsen Construction Co. (Carlsen). Connolly arranged a construction loan with Union Bank to finance the improvement. At Carlsen's request, Diamond International Corporation (Diamond) furnished materials for the shopping center. on February 15, 1973, Diamond,

after complying with the preliminary notice requirements, recorded a mechanics' lien for $6,727.84. On February 22, Diamond filed a bonded stop notice in the same amount with the bank.

Thereafter Diamond filed a timely complaint to foreclose the mechanics' lien and enforce the stop notice. Connolly and the Union Bank demurred on the ground that the mechanics' lien and stop notice violated procedural due process requirements; the court overruled the demurrer. Connolly and the bank then petitioned the Court of Appeal for writs of mandate and prohibition, requesting that the superior court be directed to dismiss the complaint or be restrained from proceeding further in the action. Deeming the matter one of statewide public importance (see Mooney v. Pickett (1971) 4 Cal.3d 669, 674-675) the Court of Appeal issued an alternative writ. The cause comes here upon petition for hearing following the decision of the Court of Appeal. [811]

By recording a mechanics' lien, Diamond obtained a lien upon Connolly's land; by filing the stop notice, it acquired a lien upon a fund lent by the Union Bank to Connolly and retained in the bank's hands for payment of construction expenses. Connolly and the bank assert that the imposition of such liens constitutes a taking of their property without due process of law. Resolution of this controversy requires consideration of three issues: (1) Does the recording of a mechanics' lien or the filing of a stop notice constitute a "taking" of a property interest? (2) Is this "taking" a form of "state action" and thus subject to the strictures of the Fourteenth Amendment? (3) Is the manner of the taking a denial of the owner's or lender's right to procedural due process? We shall discuss these issues in the order stated.

2. Both the recording of a mechanic's lien and the filing of a stop notice constitute a "taking" of the landowner's property interest.

A "taking" of property under the Fourteenth Amendment encompasses any significant deprivation of a property interest (see Randone v. Appellate Department (1971) 5 Cal.3d 536, 552) including even temporary deprivations of the use of property (Beaudreau v. Superior Court (1975) 14 Cal.3d 448, 455; Brooks v. Small Claims Court (1973) 8 Cal.3d 661, 666). This definition impels our conclusion that the recording of a mechanics' lien or the filing of a stop notice constitutes a "taking" of property in the constitutional sense.

Looking first at the mechanics' lien, we note that the claimant acquires a "direct lien" (§ 3123) superior to the rights of the owner or of any subequent purchaser or encumbrancer. No one questions that the imposition of such a lien deprives the owner of a property interest; the dispute turns on whether this is a *significant* deprivation.

Pending trial of the suit to foreclose the lien, the landowner retains the possession, use, and enjoyment of his property.[3] Subject to the lien, he may lawfully sell or encumber the property. In view of the owner's right to use and dispose of the realty, some courts have considered the deprivation of property occasioned by the recording of a mechanics' lien [812] as *de minimis,* and hence unworthy of constitutional protection. (Spielman-Fond, Inc. v. Han-

3. See Spielman-Fond, Inc. v. Hanson's Inc. (D. Ariz. 1973) 379 F. Supp. 997, 999; Cook v. Carlson (D.S.D. 1973) 364 F. Supp. 24, 27; Clark & Landers, *Sniadach, Fuentes and Beyond: The Creditor Meets the Constitution* (1973) 59 Va.L.Rev. 355, 402-403; cf. Randone v. Appellate Department, *supra,* 5 Cal.3d 536, 544, footnote 4 (attachment of real property); Black Watch Farms, Inc. v. Dick (D. Conn. 1971) 323 F.Supp. 100, 102, (same).

son's, Inc., *supra,* 379 F.Supp. 997, 999; Cook v. Carlson, *supra,* 364 F.Supp. 24, 28; see Tucker Door & Trim Corp. v. Fifteenth Street Co. (Ga. 1976) S.E.2d ; Clark & Landers, *Sniadach, Fuentes and Beyond: The Creditor Meets the Constitution* (1973) 59 Va.L.Rev. 355, 402-403.)[4]

But although the imposition of a mechanics' lien does not deprive the owner of the interim use of his property, it may severly hamper his ability to sell or encumber that property.[5] Subsequent purchasers whose title will be subject to the lien may be unwilling to purchase a lawsuit with the land; lenders may refuse a loan on property subject to lien claims; the owner may in some cases be forced to pay a possibly invalid lien in order to clear title to his property in time for a pending transaction to be consummated.

A deprivation need not reach the magnitude of a physical seizure of property in order to fall within the compass of the due process clause. In recent decisions, the United States Supreme Court and this court have extended the protections of procedural due process to such minor deprivations as a 10-day suspension from school (Goss v. Lopez (1975) 419 U.S. 565) and the requirement for a bond in appealing a small claims judgment (Brooks v. Small Claims Court, *supra,* 8 Cal.3d 661). The owner whose property has been subjected to a mechanics' lien has suffered at least as

4. Cf. Black Watch Farms, Inc. v. Dick, *supra,* 323 F.Supp. 100, 102 (attachment of real property); Empfield v. Superior Court, *supra,* 33 Cal.App. 105, 108 (lis pendens); Case Note, *Lis Pendens & Procedural Due Process* (1974) 1 Pepperdine L. Rev. 433, 438.

5. Comment, *Snaidach, Overmeyer and Fuentes: Problems for the Mechanics' Lien and Protection for Real Property Developers,* 1973 L. & Soc. Order 487, 503, 505; see Borchers Bros. v. Buckeye Incubator Co. (1963) 59 Cal.2d 234, 239; Frank Curran Lbr. Co. v. Eleven Co., *supra,* 271 Cal.App.2d 175, 183-184; cf. Gunter v. Merchants Warren National Bank (D.Me. 1973) 360 F.Supp. 1085, 1090 (attachment on real property).

serious a deprivation as did the plaintiffs in *Goss* and *Brooks,* and thus cannot be denied the protection of the due process clause. (See Barry Properties, Inc. v. The Fick Bros. Roofing Co. (Md. 1976) A.2d , ;* Roundhouse Constr. Corp. v. Telesco Masons Supplies Co. (Conn. 1975) A.2d , ;* Case Comment, *The Constitutional Validity of Mechanics' Liens under the Due Process Clause—A Reexamination after Mitchell and North Georgia* (1975) 55 B.U.L.Rev. 263, 273-276 (hereafter cited as Case Comment).) [813]

Turning to the stop notice, we see that unlike the mechanics' lien claimant, the stop notice claimant does not acquire a lien upon tangible property, but attaches an obligation whereby the lender agrees to provide credit to the owner. The filing of a stop notice is thus a form of garnishment,[6] a form of seizure that Randone v. Appellate Department, *supra,* 5 Cal.3d 536, 552 held a "taking" of property.

The deprivation of property occasioned by the filing of the stop notice is not de minimis. Pointing out that the credit thus garnished is earmarked for the purpose of paying construction costs, Diamond argues that constitutional protection is limited to credit available to pay for the necessities of life. But the Supreme Court has clearly rejected the view that the due process clause protects only funds available for necessities; credit employed for commercial venture also enjoys constitutional protection. (See North Georgia Finishing, Inc. v. Di-Chem, Inc., *supra,* 419 U.S.

*Slip opinion at pages 9-10.

*Slip opinion at page 6.

6. See section 3083; Korherr v. Bumb (9th Cir. 1958) 262 F.2d 157; Systems Inv. Corp. v. National Auto & Cas. Ins. Co. (1972) 25 Cal.App.3d 1057, 1061; Frederickson v. Harney (1962) 199 Cal.App.2d 189, 193 and cases there cited.

601, 608.) When a stop notice is filed, the lender, threatened with personal liability if it disregards the notice, may divert credit needed to pay for future construction to comply with the stop notice claim.[7] Thereby denied the money on which he relied to complete the project, the owner may be forced into default on the loan, and consequently lose his property.[8]

We conclude that the filing of a stop notice, as well as the recording of a mechanics' lien, deprives the landowner of a significant property [814] interest, and thus constitutes a "taking" within the meaning of the federal and state due process clauses.[9]

7. Diamond suggests that a lender, in its own self-interest, will sometimes choose to disregard the stop notice and assume the risk of personal liability. (See, e.g., Systems Inv. Co. v. National Auto & Cas. Co., *supra,* 25 Cal.App.3d 1057, 1059; Idaco Lumber Co. v. Northwestern S. & L. Assn., *supra,* 265 Cal.App.2d 490, 493; H. O. Bragg Roofing, Inc. v. First Federal Sav. & Loan Assn. (1964) 226 Cal. App.2d 24, 25-26; Rossman Mill & Lbr. Co. v. Fullerton S. & L. Assn., *supra,* 221 Cal.App.2d 705; Calhoun v. Huntington Park First Sav. & Loan Assn. (1960) 186 Cal.App.2d 451, 458.) But there is no way for the owner to compel the lender to disburse funds in violation of the stop notice.

8. For analysis of the problems which the filing of a stop notice can cause the owner and construction lender, see Ilyin, *Stop Notice!—Construction Loan Officer's Nightmare* (1964) 16 Hastings L.J. 187, 191-194; Miller, *Validity of the Stop Notice as a Summary Remedy* (1973) 48 State Bar J. 45, 106; Note, *California's Private Stop Notice Law: Due Process Requirements* (1974) 25 Hastings L.J. 1043, 1052-1054.

9. We conclude, however, that neither the recording of a mechanics' lien nor the filing of a stop notice constitutes a taking of the *lender's* property. The mechanics' lien attaches to the landowner's realty; the stop notice garnishes the landowner's credit; neither encumber property of the lender. Although the filing of a stop notice imposes upon the lender a liability to the claimant which the lender has not contractually agreed to assume, the imposition of that liability does not constitute a "taking" of property in the constitutional sense. (See California Auto Assn. v. Maloney (1951) 341 U.S. 105, 110-111.)

3. The imposition of a lien on the owner's property by the recording of a mechanics' lien or the filing of a stop notice constitutes "state action."

Since "private action, however hurtful, is not unconstitutional" (Kruger v. Wells Fargo Bank (1974) 11 Cal.3d 352, 358; see Shelley v. Kramer (1948) 334 U.S. 1, 13), we must next inquire whether the State of California is so significantly involved in the imposition of these liens that we may characterize that imposition as "state action."[10] (Kruger v. Wells Fargo Bank, *supra,* 11 Cal.3d 352, 359; see Adams v. Southern California First National Bank (9th Cir. 1973) 492 F.2d 324, 330; Kipp v. Cozens (1974) 40 Cal.App.3d 709, 716; cf. Moose Lodge No. 107 v. Irvis (1972) 407 U.S. 163, 173.)[11]

In Adams v. Department of Motor Vehicles (1974) 11 Cal.3d 146 we held that the action of a private automobile repairman in asserting a possessory garageman's lien, and selling the customer's vehicle pursuant to that lien, constituted state action on the ground that "the lien is expressly provided for by statute, and a state agency oversees the sale and records the transfer of title." (11 Cal.3d at p. 153.) Similar indicia of significant state involvement call [815]

10. Obviously all statutes, including the mechanics' lien and stop notice laws, constitute state action of a sort, for the Legislature and not private persons enact legislation. (See generally Horowitz & Karst, *The California Supreme Court and State Action Under the Fourteenth Amendment: The Leader Beclouds the Issue* (1974) 21 U.C.L.A.L.Rev. 1421.) But the mechanics' lien and stop notice laws did not take defendants' property; Diamond took the property, and the question is whether the state, by reason of those laws, is so significantly involved in the taking that we may treat that taking as state action.

11. The following discussion and resolution of the state action issue adheres closely to the analysis of the Court of Appeal opinion prepared by Presiding Justice George Brown.

for the conclusion that the imposition and enforcement of mechanics' liens and stop notices constitute state action.[12]

There is no question but that the mechanics' lien involves significant state action. Not only is the lien governed by detailed statutory provisions, but it becomes effective only upon recordation with the county recorder, an official of the state; moreover, it can be enforced only by resort to the state courts.[13]

The stop notice is equally subject to comprehensive statutory regulation; further, unlike the Mechanics' Lien Law, the stop notice statutes create a new remedy unknown to the common law.[14] Although the stop notice attaches without

12. Diamond notes that in Adams v. Department of Motor Vehicles, *supra,* 11 Cal.3d 146, we upheld the garageman's lien to the extent that it permitted interim retention of the automobile (see at pp. 154-155), but struck down the statutes authorizing sale of the car without a hearing (at pp. 155-156). Diamond suggests that our holding in *Adams* rests on an implicit finding that the state was not significantly involved in the garageman's lien until the time of sale, and argues that the state is not significantly involved in the mechanics' lien or stop notice procedures until the claimant files suit to enforce his lien. This argument misconstrues *Adams,* which clearly held that the garageman's lien procedure as a whole involved state action, but that the garageman's interim retention of possession comported with due process. (See at pp. 152-154.)

13. See Clark & Landers, *Sniadach, Fuentes and Beyond: The Creditor Meets the Constitution* (1973) 59 Va.L.Rev. 355, 402; Case Comment (1975) 55 B.U.L. Rev. 263, 264, footnote 4.

14. In Kruger v. Wells Fargo Bank, *supra,* 11 Cal.3d 352, 362-363, we suggested that private summary seizure would be more likely to constitute a form of state action if that seizure was based upon a statute which created a remedy unknown to the common law. This reasoning has been criticized on the ground that the degree of state involvement in the remedy does not turn upon the age or origin of the remedy (see Burke & Reber, *State Action, Congressional Power & Creditors' Rights: An Essay on the Fourteenth Amendment* (1973) 47 So.Cal.L.Rev. 1, 47-48), and indeed remedies of venerable common law origin such as garnishment and attachment have been held to involve state action. (Sniadach v. Family Finance Corp. (1969) 395 U.S. 337; Randone v. Appellate Department (1971) 5 Cal.3d 536.) We do not therefore rest our holding that stop notice procedures involve state action merely upon the fact that the procedure was created by statute.

filing or recordation before any state official, that lien is effective only because the state statute permits a suit to impose personal liability upon a lender or owner who disregards the notice. Thus the filing and enforcement of the stop notice "is not just action against a backdrop of an amorphous state policy, but is instead action encouraged, indeed only made possible, by explicit state authorization." (Klim v. Jones (D.D.Cal. 1970) 315 F.Supp. 109, 114.)[816]

Amicus, in arguing that mechanics' liens and stop notices do not involve state action, cites decisions upholding such self-help remedies as setoff (Kruger v. Wells Fargo Bank, *supra,* 11 Cal.3d 352) and repossession (Adams v. Southern California First National Bank, *supra,* 492 F.2d 324; Kipp v. Cozens, *supra,* 40 Cal.App.3d 709). Both setoff and repossession, however, involve private action sufficient in itself to enforce the creditor's claim. The only state action there present consisted of legislative and judicial recognition of the lawfulness of the private action; the courts properly held such recognition did not constitute significant state involvement in the private act. (See discussion in Kruger v. Wells Fargo Bank, *supra,* 11 Cal.3d at pp. 363-364; Adams v. Southern California First National Bank, *supra,* 492 F.2d 324, 330.)

In contrast to the above private action, the state in the present case has not merely authorized the laborer and materialman to record a mechanics' lien, but compelled the owner, and any subsequent purchaser or encumbrancer, to recognize the priority of that lien; the state has not merely permited the laborer and materialman to file a stop notice, but required the lender, on pain of personal liability, to withhold the claimed funds. Moreover, neither the mechanics' lien nor the stop notice can be enforced without the

assistance of the state. Thus the level of state involvement here far transcends that present in the setoff and repossession cases.

4. The mechanics' lien and stop notice laws comply with due process requirements.

We turn now to the principal issue in this case—whether the procedures established by the mechanics' lien and stop notice laws comply with constitutional requirements. In other jurisdictions three federal district courts and the Georgia Supreme Court have upheld the constitutionality of mechanics' lien laws (Cook v. Carlson, *supra,* 364 F.Supp. 24; Ruocco v. Brinker (S.D.Fla. 1974) 380 F.Supp. 432; Spielman-Fond, Inc. v. Hanson's Inc., *supra,* 379 F.Supp. 997, affd. 417 U.S. 901; Tucker Door & Trim Corp. v. Fifteenth Street Corp., supra, S.E.2d); state courts in Connecticut and Maryland have held their mechanics' lien laws unconstitutional (Roundhouse Constr. Corp. v. Telesco Masons Supplies Co., *supra,* A.2d , vacated and remanded for a determination whether the decision rests on an independent state ground (1975) U.S. , reaffd on both state and federal grounds (1976) A.2d ; Barry Properties, Inc. v. The Fick Bros. Roofing Co., *supra,* A.2d). As to [817] California this issue is one of first impression. The California stop notice law is unique (see Note, *California's Private Stop Notice Law: Due Process Requirements* (1974) 25 Hastings L.J. 1043, 1054-1057); no decisions have considered the constitutionality of that law.

Resolution of the issues before us, consequently, turns not upon the application of specific precedent, but upon the general principles established by the line of decisions respecting creditors' remedies descended from Sniadach v. Family Finance Corp. (1969) 395 U.S. 337. We first set

forth the major cases in historical progression; thereafter, we analyze and find unacceptable plaintiff's contention that one of the most recent Supreme Court cases, North Georgia Finishing, Inc. v. Di-Chem, Inc., *supra,* 417 U.S. 907, controls the instant situation.

The seminal case of *Sniadach* itself held merely that wage garnishment without prior hearing was unconstitutional, leaving for later resolution the constitutionality of other remedies. Fuentes v. Shevin (1972) 407 U.S. 67, a four-to-three decision, struck down Florida and Pennsylvania replevin statutes on the ground that "They allow summary seizure of a person's possessions when no more than private gain is directly at stake," (p. 92) asserting that a *preseizure hearing* was essential except in "extraordinary . . . truly unusual" situations. (407 U.S. at p. 90.)

Two years later, in Mitchell v. W. T. Grant Co. (1974) 416 U.S. 600, the court severely limited the scope of *Fuentes.* W. T. Grant had sold household appliances to Mitchell under an installment contract. When Mitchell failed to make installment payments, W. T. Grant seized the appliances pursuant to a Louisiana law which authorized courts to issue a writ of sequestration based on an ex parte judicial determination. Although the sequestration law provided no notice or hearing before the seizure, a majority of the court upheld its constitutionality.

Writing for the majority, Justice White observed that: "Plainly enough, this is not a case where the property sequestered by the court is exclusively the property of the defendant debtor. The question is not whether a debtor's property may be seized by his creditors, *pendente lite,* where they hold no present interest in the property sought to be seized. The reality is that both seller and buyer had current, real interests in the [818] property . . . . Resolution

of the due process question must take account not only of the interests of the buyer of the property but those of the seller as well." (416 U.S. at p. 604.)

Fuentes, the court held, did not impose a rigid requirement for a preseizure hearing. "The requirements of due process of law 'are not technical, nor is any particular form of procedure necessary.' *Inland Empire Council v. Millis,* 325 U.S. 697, 710 (1945). . . . 'The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.' *Cafeteria Workers v. McElroy,* 367 U.S. 886, 895 (1961); *Stanley v. Illinois,* 405 U.S. 645, 650 (1972)." (P. 610.)

The court then reviewed the safeguards included in Louisiana's sequestration procedure. Noting that the act narrowly limited the grounds upon which the writ may issue, required bonding of the creditor and judicial examination of the application for the writ, provided for a prompt post-lien hearing, and granted the debtor a cause of action for wrongful seizure, the court concluded that "Considering the Louisiana procedure as a whole, we are convinced that the State has reached a constitutional accommodation of the respective interests of buyer and seller." (Ibid.)

When the court decided *Mitchell* on May 14, 1974, it had pending before it both an appeal in Spielman-Fond, Inc. v. Hanson's Inc., *supra,* 379 F.Supp. 997, a decision of a three-judge district court upholding the constitutionality of the Arizona mechanics' lien law, and a petition for certiorari in North Georgia Finishing, Inc. v. Di-Chem, Inc. (Ga. 1973) 201 S.E.2d 321, a state court decision upholding the constitutionality of Georgia's garnishment law. Two weeks later, on May 28, the court affirmed the decision in *Spielman-Fond* in a one-line, unanimous opinion. (417 U.S. 901.) On

the same day the court granted certiorari in *North Georgia.* (417 U.S. 907.)

The court handed down its opinion in *North Georgia* the following term, with Justice White, author of the majority opinion in *Mitchell,* again writing for the court. Comparing *North Georgia* to *Mitchell v. W. T. Grant,* Justice White noted that the Louisiana statute sustained in *Mitchell* required judicial examination of the creditor's factual affidavit before the writ issued, and entitled the debtor to a prompt post-lien [819] hearing. "The Georgia Garnishment statute," he stated, "has none of the saving characteristics of the Louisiana statute." (419 U.S. at p. 607.) Georgia law permitted a court clerk to issue a writ of garnishment on the basis of conclusory affidavits submitted by the creditor. "Upon service of the writ, the debtor is deprived of the use of the property in the hands of the garnishee" (ibid.); "the debtor's bank account was impounded, and, absent a bond, put totally beyond use during the pendency of the litigation." (P. 606.) The Georgia statute did not provide "for an early hearing at which the creditor would be required to demonstrate at least probable cause for the garnishment. Indeed, it would appear that without the filing of a bond the defendant debtor's challenge to the garnishment will not be entertained, whatever the grounds may be." (P. 607.) The court accordingly found the Georgia garnishment law unconstitutional.

Plaintiffs maintain that the decision in *North Georgia* controls the case at bar and establishes that no summary creditors' remedy is constitutional unless the state provides for both prior judicial authorization and an early post-taking hearing. We explain the reasons why we reject plaintiff's interpretation of the Supreme Court decision.

In the first place, the Supreme Court summarily affirmed the district court's decision in *Spielman-Fond,* a Supreme Court decision on the merits (see Ohio ex rel. Eaton v. Price (1959) 360 U.S. 246, 247), upholding the constitutionality of a mechanics' lien law substantially identical to the California statute. *Spielman-Fond* was not expressly overruled by *North Georgia,* and remains today the only Supreme Court ruling upon the merits of a constitutional challenge to the mechanics' lien laws.

In the second place, *North Georgia* and *Spielman-Fond* are distinguishable and thus *North Georgia* did not impliedly overrule *Spielman-Fond.*[15] As the Maryland Court of Appeals observed: "The Arizona law upheld in *Spielman-Fond,* although it did not provide for notice or a prior hearing, requires the claim to a lien to be made under oath, on personal knowledge and recorded within sixty or ninety days; the owner to be notified within a reasonable time of the filing of the claim; the claimant to institute a suit to enforce the lien within six months after its [820] filing; and permits the owner to discharge the lien by filing a bond. . . . Consequently, the Supreme Court may have thought that the Arizona statute [in contrast to the Georgia garnishment statute] contained enough safeguards to satisfy due process." (Barry Properties, Inc. v. The Fick Bros. Roofing Co., *supra,* A.2d , .)*

The California statutes challenged here contain *more* safeguards than the Arizona statute approved in *Spielman-*

15. The fact that the Supreme Court affirmed the judgment in *Spielman-Fond* on the same day that it granted certiorari in *North Georgia* suggests that the court may have compared the two cases, and concluded that they presented distinguishable legal issues.

*Slip opinion at page 22.

Fond. As in Arizona, claims of lien and stop notices must be signed and verified (§§ 3084, 3103); additionally, a lender may disregard an unbonded stop notice. Unlike the Arizona procedure, the California claimant must notify the owner before he asserts the lien. (§ 3097.) The California owner and lender cannot only secure the release of an existing mechanics' lien or stop notice by filing a bond (§§ 3143, 3171), but can also, by recording a payment bond, secure advance protection against any lien or notice (§§ 3139, 3161, 3162, 3235). Finally, while the Arizona law required suit by the claimant within six months, California enforces a 90-day period of limitation.

In the third place, even without reliance upon *Spielman-Fond* and the provisions of the Arizona law there upheld, the characteristics of the California mechanics' lien and stop notice laws differ so significantly from the garnishment law struck down in *North Georgia* that the *North Georgia* decision cannot control the outcome of the present case.

First, the Georgia garnishment law permitted the creditor to deprive the debtor of the interim use of a bank account utilized to pay ordinary business expenses; it was "put totally beyond use during the pendency of the litigation." (419 U.S. at p. 606.) The California mechanics' lien, as we explain in more detail later, does *not* deprive the owner of the interim use of property or of its possession; the stop notice deprives him only of the interim use of a *special fund* set aside to pay construction debts and not available for ordinary expenses. The Georgia law thus worked a far more severe deprivation upon the property owner than California's mechanics' lien and stop notice laws.

Second, the Georgia law could not be justified by the presence of the creditor's interest in the property seized. The Georgia garnishment law permitted the creditor to garnish *any* account of the debtor, regardless of whether the creditor had any interest in that account. The California statutes, on the other hand, permit laborers and materialmen to place [821] a lien only on property whose value they have enhanced by their labor, and to garnish only accounts set aside to pay their claims. Hence in the present case the admonition of Mitchell v. W. T. Grant Co., *supra,* 416 U.S. 600, 604, applies: that when the creditor has an *interest* in the property seized, resolution of the due process question requires an accommodation of the interests of *both* creditor and debtor. In *North Georgia,* the absence of a creditor interest in the seized property enabled the court to pass lightly over the process of accommodating competing interests; that decision cannot dictate the resolution of the viable compound of competing interests in the instant case.

This distinction is carefully explained in Beaudreau v. Superior Court, *supra,* 14 Cal.3d 448, a case upon which the dissent heavily relies. In that case we held that statutes which required a plaintiff who sued a public entity to post an undertaking for costs denied such plaintiff due process of law. Distinguishing Mitchell v. W. T. Grant Co., supra, we stated that: "In *Mitchell* the party who suffered the taking as well as the party who benefitted thereby had 'current, real interests in the property.' The high court emphasized that the '[r]esolution of the due process question must take account not only of the interests of the buyer of the property but those of the seller as well.' (Mitchell v. W. T. Grant Co., *supra,* 416 U.S. at p. 604 [40 L.Ed.2d at p. 412].) We, too, have recognized the need to accommodate compet-

ing interests of two parties in the same property when determining the constitutional requisites for a valid taking. (See, e.g., Adams v. Department of Motor Vehicles, *supra,* 11 Cal.3d at pp. 154-155.) Unlike the statute in *Mitchell,* the statutes now before us deprive the plaintiff of property in which the defendant has no competing interest." (P. 464.)

Beaudreau cites *Mitchell* and *Adams* as examples of cases in which the court must accommodate competing interests. In *Mitchell* the competing interests arose because the seller reserved a security interest in property in possession of the buyer; in *Adams* the repairman by his labor and materials increased the value of the debtor's car, and sought to retain the car as security for payment. The present case resembles both precedents; here the mechanic by his labor and materials has enhanced the value of realty in the owner's possession, and requires a lien to ensure that he will be paid for his efforts. Thus, as *Beaudreau* indicates, we cannot determine the requisites of due process in the present case by blindly following language from cases which did not involve competing interests; we must instead direct our attention to identifying, weighing, and [822] accommodating the competing interests arising under the mechanics' lien and stop notice laws.

Third, the Georgia garnishment law provided no means by which the debtor could seek a speedy post-lien hearing and, in fact, barred a debtor from contesting the validity of the garnishment unless he posted a bond. California law, in contrast, offers equitable remedies which the owner or lender can employ to obtain a speedy hearing on the probable validity of the lien.

Before recording a mechanics' lien or filing a stop notice, the claimant must serve a preliminary notice upon the

owner, the contractor, and the construction lender.[16] (§§ 3097, 3114, 3160.) Upon receipt of such a notice from one not entitled to claim a lien, the owner or lender may immediately file suit to enjoin the claimant from asserting his lien. (Code Civ. Proc., § 526.) By the use of a temporary restraining order if necessary (see Code Civ. Proc., § 527), the plaintiff could secure a hearing before the lien was imposed.[17]

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16. Although the California statutes do not provide for prior judicial scrutiny of the papers on which the lien is based, this lacuna is of little significance. An ex parte judicial examination of documents submitted solely by the claimant would in most cases provide only an illusory protection. (See Case Comment (1975) 55 B.U.L.Rev. 263, 285.) By granting the owner 20 days advance notice of the lien—a safeguard not provided by the sequestration law upheld in *Mitchell*—the California statutes permit the owner to investigate the basis of the lien and to seek a hearing before the lien becomes effective, a protection of much greater value than the Louisiana debtor's right to ex parte judicial review of the application for a writ of sequestration.

17. In Adams v. Department of Motor Vehicles, *supra,* 11 Cal. 3d 146, we held the owner's opportunity to seek injunctive relief insufficient to avoid the unconstitutionality of the statutes providing for sale of a car subject to a garageman's lien without notice and hearing, on the ground that "Since temporary injunction is an extraordinary remedy and is thus discretionary . . ., it lacks the certainty and necessity to *insure a hearing prior to permanent deprivation.*" (11 Cal.3d at p. 156.) (Emphasis added.) In the case of mechanics' liens and stop notices, however, the owner is entitled by *statute* to a hearing before he is *permanently* deprived of his property by enforcement of those liens. The purpose of an action for injunctive relief, thus, is merely to obtain a hearing *prior* to the imposition of an interim lien which imposes relatively minor restrictions upon the use of the property. (See discussion at pp. , post.•) Since the constitutionality of such an interim deprivation does not require final proof of the validity of the lien, but only proof of probable cause (North Georgia Finishing, Inc. v. Di-Chem, Inc., *supra,* 419 U.S. 601, 607; *id.,* concurring opinion of Powell, J., 419 U.S. at p. 612), the hearing upon a motion for preliminary injunction should meet the Constitutional standards.

•Typed opinion, page 39.

Even after the lien has been recorded, or the stop notice filed, the owner in many instances could seek a mandatory injunction ordering the [823] claimant to release the lien.[18] (See People v. Paramount Citrus Assn. (1957) 147 Cal. App.2d 399, 413; 2 Witkin, Cal. Procedure (2d ed. 1970) pp. 1515-1516.) In any event, the owner need not wait until the claimant sues to enforce the lien; the imposition of that lien, and the owner's denial of its validity, comprise a controversy sufficient to permit an immediate suit for declaratory relief. (See Code Civ. Proc., § 1060.) Such a declaratory relief action can claim priority on the calendar of the trial court. (Code Civ. Proc., § 1062a.)[19] Thus by filing an action for injunctive or declaratory relief, the owner or lender can obtain a hearing either before imposition of the lien or within a reasonable period thereafter.

More fundamentally, the plaintiff's reliance upon *North Georgia* to establish inflexible requirements for summary creditors' remedies conflicts with the basic philosophy of procedural due process established in an array of recent

18. Despite the statutory requirement for a 20-day preliminary notice (§ 3097), in some cases the owner or lender will not learn of the defect in the lien until after the lien has been imposed. An obvious example is the lien which is defective on the ground that the lienor failed to comply with the preliminary notice requirement. Additionally, the preliminary notice need only state "A general description of the labor . . . or materials furnished or to be furnished, and if there is a construction lender, he shall be furnished with an estimate of the total price thereof. . . . (§ 3097, subd. (c)(1).) Thus a dispute concerning the exact amount due might not crystallize until after the lien is imposed.

19. The dissent suggests that the mechanics' lien and stop notice laws, by providing for a speedy hearing on public stop notices, impliedly bar resort to equitable remedies to secure a speedy hearing on mechanics' liens and private stop notices. This interpretation of the statutes is not only destitute of authority or legislative history, but runs afoul of the principle that the courts must construe legislation to uphold its validity. (See Braxton v. Municipal Court (1973) 10 Cal.3d 138, 145; In re Kay (1970) 1 Cal.3d 930, 942.)

decisions. As summarized in the court's most recent opinion on procedural due process, Mathews v. Eldridge (1976) U.S. : "These decisions underscore the truism that '"[d]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' Cafeteria & Restaurant Workers Local 473 v. McElroy, 367 U.S. 886, 895 (1961). '[D]ue process is flexible and calls for such procedural protections as the particular situation demands.' Morrisey v. Brewer, 408 U.S. 471, 481 (1972). Accordingly, *resolution of the issue whether the . . . procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected.*" (Emphasis added.) (P. .)*

This expression of the principle of procedural due process in *Mathews* echoes the court's earlier holding in *Mitchell.* As we have noted, the [824] court there upheld the constitutionality of the alleged provision on the ground that "the State has reached a constitutional accommodation of the respective interests of the buyer and seller."[20] (416 U.S. at p. 610.)

*44 U.S.L. Week at page 4229.

20. Other cases follow the approach of accommodating the interests of the debtor and creditor in upholding the constitutionality of legislation similar to the instant statutes. Cook v. Carlson, *supra,* 364 F.Supp. 24 suggests a process of accommodating competing interests in which the requirements of due process, as applied to creditors' remedies, depend "upon a judicial weighing of the seriousness of the deprivation against the importance of the governmental or public interest served by summary procedures." (364 F.Supp. 24, 25.) Discussing the constitutionality of attachment of real property, Central Sec. Nat. Bank of Lorain Cty. v. Royal Homes, Inc. (E.D. Mich. 1974) 371 F.Supp. 476, 480, stated that "The defendants' right to use, possess and alienate their property pending the outcome of the litigation must be balaneed against the plaintiff's right to preserve an asset of the defendants to be used in satisfaction of plaintiff's judgment." To the same effect: Lindsey v. Normet (1972) 405 U.S. 56 (unlawful detainer); Jonnet v. Dollar Savings Bank of New York (3d Cir. 1976) F.2d

We do not believe *North Georgia* should be interpreted as an aberrational departure from this consistent line of decisions that attempt to resolve due process issues by identifying and accommodating competing governmental and private interests. Although *North Georgia* emphasized that the Georgia garnishment statute lacked the safeguards of the Louisiana law upheld in *Mitchell,* the court did not assert that the safeguards incorporated in the Louisiana law are the *only* safeguards that will pass constitutional muster. *Mitchell* itself placed no stress on any particular procedural device, but proclaimed that due process adjudication was not a matter of enforcing inflexible rules but of accommodating competing interests; *North Georgia,* authored by the same justice who wrote for the *Mitchell* majority, did not reject that philosophy. We therefore view *North Georgia* not as a decision repudiating the accommodation of the interests required by *Mitchell,* but as applying that method to strike down a statute which did not properly accommodate such competing interests, but instead, provided virtually no safeguards against a creditor's improper seizure of property in which he had no interest. (See Pearson, *Due Process and the Debtor: The Impact of* Mitchell v. W. T. Grant (1975) 28 Okla.L.Rev. 743, 791-792; 28 Vand.L.Rev. (1975) 908, 918.)

In conclusion, this case cannot be decided simply by laying the California laws alongside the Louisiana law approved in *Mitchell,* and [825] then striking down the California law because it contains different safeguards

(attachment); Ruocco v. Brinker, *supra,* 380 F.Supp. 432, 437 (mechanics' lien); Property Research Financial Corp. v. Superior Court (1972) 23 Cal.App.3d 413, 420 (attachment of property of non-resident). (See also Empfield v. Superior Court, *supra,* 33 Cal.App.3d 105, 108 (lis pendens); Note (1975) 88 Harv.L.Rev. 1510, 1515 and fn. 26.)

than did the Louisiana law. "Identification of the precise dictates of due process requires consideration of both the governmental function involved and the private interests affected." (Fusari v. Steinberg (1975) 419 U.S. 379, 389; see Mathews v. Eldridge, *supra,* U.S. , .)* No shortcut will enable us to adjudicate the constitutionality of the California mechanics' lien and stop notice laws without undertaking the task of identifying and accommodating the competing interests involved. To that analysis we now turn.

We weigh, first, the seriousness of the deprivation caused the debtor, since "the degree of potential deprivation . . . is a factor to be considered in assessing the validity of any . . . decisionmaking process." (Mathews v. Eldridge, *supra,* U.S. at p. .)* Although we concluded earlier in this opinion that the taking of property occasioned by a stop notice or mechanics' lien is not de minimis (see *ante* at p.).** it is nonetheless of relatively minor effect. Most creditors' remedies—attachment; garnishment; replevin; the landlord's, innkeeper's, or garageman's liens—deprive the debtor of the possession and use of property which may be essential to his subsistence. The mechanics' lien, however, does not deprive the owner of the interim possession or use of the liened property; although the stop notice may deprive the owner of the use of funds, the stop notice lien attaches only to a limited line of credit set aside to pay construction expenses.

Turning, second, to the interests of the laborers and materialmen, we note the historical recognition of the importance of these liens. These liens can be asserted only

*44 U.S.L. Week at page 4229.

*44 U.S.L. Week at page 4231.

**Typed opinion, pages 11-16.

by persons who have contributed labor or supplied materials; the claimant has helped to create an improvement which enhances the value of that realty. As explained in the early decision of Tuttle v. Montford (1857) 7 Cal. 358, 360: "The lien of the mechanic, artisan, and materialman, is more equitable and more favored in law, because those parties have, at least in part, created the very property upon which the lien attached. . . ."[21]

In this respect the present case is analogous to Adams v. Department of Motor Vehicles, *supra,* 11 Cal.3d 146, which upheld an interim retention [826] of possession under a garageman's lien. Distinguishing cases striking down attachment, garnishment, and replevin, we observed that "Usually the claim of an attaching or garnisheeing creditor is a general claim unrelated to the specific property seized. And while the claim of a conditional vendor or chattel mortgagee arises out of a transaction involving the seized chattel itself, the interest of such creditor in the seized chattel is ordinarily purely pecuniary; the creditor has not, subsequent to the acquisition of the chattel by the vendee or mortgagee, *mixed his own labor with it, nor,* more significantly, *has he added to it materials to which he originally had a right of possession.*" (11 Cal.3d at pp. 154-155; see also Beaudreau v. Superior Court, *supra,* 14 Cal.3d 448, 464.) (Emphasis added.)

The remedy of stop notice is also limited to persons who supply labor or materials (§§ 3158, 3159), and, when served upon the construction lender, attaches only to funds previously committed to finance construction of the improvement (§ 3162). Although the work of the laborer and goods

21. See also Humboldt Lumber Mill Co. v. Crisp (1905) 146 Cal. 686, 687-688; L.A. etc. Brick Co. v. L.A. etc. Dev. Co. (1908) 7 Cal.App. 460, 461.

of the materialman do not *directly* enhance the value of the loan funds, that fund is commonly secured by a trust deed upon the real property where the improvement is constructed. By enhancing the value of that realty, the laborer and materialman also increase the security of the fund. (H. O. Bragg Roofing, Inc. v. First Federal Sav. & Loan Assn., *supra,* 226 Cal.App.2d 24, 28; Rossman Mill & Lbr. Co. v. Fullerton S. & L. Assn., *supra,* 221 Cal.App.2d 705, 709.)

The mechanics' lien derives from the California Constitution itself; the Constitution of 1879 mandated the Legislature to grant laborers and materialmen a lien upon the property which they have improved;[22] no other creditors' remedy stems from constitutional command. (See Martin v. Becker (1915) 169 Cal. 301, 316.) Indeed this state, from the earliest days, and consistently thereafter has asserted its interest in protecting the claims of laborers and materialmen. In 1850 the first session of the California Legislature enacted a mechanics' lien law (Stats. 1850, ch. 87, §§ 1-14, at pp. 211-213).[23] Moreover, the courts have uniformly classified the mechanics' lien laws as remedial legislation, to [827] be liberally construed for the protection of laborers and materialmen.[24] When the practice of recording a construction loan trust deed before the commencement of

22. Article XX, section 15 provides as follows: "Mechanics, persons furnishing materials, artisans, and laborers of every class, shall have a lien upon the property upon which they have bestowed labor or furnished material for the value of such labor done and material furnished; and the Legislature shall provide, by law, for the speedy and efficient enforcement of such liens."

23. See Tuttle v. Montford, *supra,* 7 Cal. 358, 360; Homestead Sav. & Loan Assn. v. Superior Court (1961) 195 Cal.App.2d 697, 700; MacQuiddy v. Rice (1941) 47 Cal.App.2d 755, 757.

24. See Hendrickson v. Bertelson (1934) 1 Cal.2d 430, 432-438; Corbett v. Chambers (1895) 109 Cal. 178, 184; Nolte v. Smith (1961) 189 Cal.App.2d 140, 144.

construction reduced the effectiveness of the mechanics' lien, the courts and the Legislature evolved alternative remedies—the equitable lien[25] and the stop notice—which attach directly to the loan fund.

This protective policy continues to serve the needs of the construction industry. As was pointed out in Cook v. Carlson, *supra,* 364 F.Supp. 24, 29: "Labor and material contractors [in the construction industry] are in a particularly vulnerable position. Their credit risks are not as diffused as those of other creditors. They extend a bigger block of credit, they have more riding on one transaction, and they have more people vitally dependent upon eventual payment. They have much more to lose in the event of default. There must be some procedure for the interim protection of contractors in this situation." Without such interim protection, the improvement may be completed, the loan funds disbursed, and the land sold before the claimant can obtain an adjudication on the merits of his claim.

In summary, we conclude that the recordation of a mechanics' lien, or filing of a stop notice, inflicts upon the owner only a minimal deprivation of property; that the laborer and materialman have an interest in the specific property subject to the lien since their work and materials have enhanced the value of that property; and that state policy strongly supports the preservation of laws which give the laborer and materialman security for their claims.

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25. Under the theory of equitable lien, the courts held that a person who was induced to supply labor and materials in reliance upon the construction loan fund could assert a lien against that fund. (See A-1 Door & Materials Co. v. Fresno Guar. Sav. & Loan Assn., *supra,* 61 Cal.2d 728, 732; Smith v. Anglo-California Trust Co. (1928) 205 Cal. 496, 501-504; Miller v. Mountain View Sav. & Loan Assn. (1965) 238 Cal.App.2d 644, 661-662.) The enactment of Civil Code section 3264 in 1969 abolished the nonstatutory equitable lien. (Boyd & Lovesse Lumber Co. v. Modular Marketing Corp. (1975) 44 Cal.App.3d 460, 465.)

In measuring these values, we do not deal in cold abstractions: we take into account the social effect of the liens and the interests of the workers and materialmen that the liens are designed to protect. We measure these valued interests against the loss, if any, caused to the owner. The balance tips in favor of the worker and the materialman; we conclude that the safeguards provided by California [828] law to protect property owners against unjustified liens are sufficient to comply with due process requirements.[26] We therefore uphold the constitutionality of the mechanics' lien and stop notice laws.[27]

The alternative writs of mandate and prohibition issued by the Court of Appeals are discharged, and the peremptory writs denied.

/s/ TOBRINER, J.

WE CONCUR:

/s/ WRIGHT, C.J.
/s/ MOSK, J
/s/ SULLIVAN, J.

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26. We hold only that the present statutory and judicial remedies against invalid liens are adequate to avoid the unconstitutionality of the mechanics' lien and stop notice laws, not that no better remedy can be fashioned. We note, for example, that the Legislature has provided a special summary procedure for determining the validity of stop notice claims on public projects. (§§ 3197-3205.) The extension of such a procedure to encompass stop notices on private improvements, and possibly mechanics' liens, might provide the private owners and lenders with a remedy superior to that afforded by injunctive or declaratory relief. (See Note, *California's Private Stop Notice Law: Due Process Requirements* (1974) 25 Hastings L.J. 1043, 1072-73.)

27. Our conclusion, founded upon both federal and state precedent, applies equally to the due process clauses of the federal and state Constitutions.

CONNOLLY DEVELOPMENT, INC. et al. v.
THE SUPERIOR COURT OF MERCED COUNTY

S.F. 23225

DISSENTING OPINION BY RICHARDSON, J.

I respectfully dissent. Neither the California mechanics' lien law (Civ. Code, § 3109 et seq.) nor the stop notice procedures applicable to private construction (*id.*, § 3156 et seq.) meet the due process requirements of the United States Constitution as recently interpreted by the federal Supreme Court and by us. Both creditor's remedies fail to afford those minimal protections currently mandated and are, in my view, unconstitutional under the reasoning of federal and state decisions following the important case of Sniadach v. Family Finance Corp. (1969) 395 U.S. 337.

The majority make two preliminary concessions as I believe they must. First, they acknowledge that both the recordation of a mechanics' lien and the filing of a stop notice constitute a "taking" of property. Second, they conclude that both the lien and the stop notice involve "state action" to a degree invoking constitutional review. Accepting the foregoing, however, and at this point we part company, the majority conclude that both procedures meet current due process demands.

My principal disagreement focuses on the majority's insistence that the challenged creditor's remedies furnish sufficient procedural safeguards under those applicable decisions of the United States Supreme Court and of this court to which I now turn. As recognized by the majority, the most recent pronouncement of the high court on the due [829] process requirements in this area is North Georgia Finishing, Inc. v. Di-Chem, Inc. (1975) 419 U.S. 601. *North Georgia* and our own very recent careful analysis in Beaudreau v. Superior Court (1975) 14 Cal.3d 448, in my view, furnish adequate guidance for the proper resolution of this case.

North Georgia must be viewed and understood in its historic and developmental context. In 1969 the Supreme Court in *Sniadach, supra,* struck down a Wisconsin wage garnishment statute which had permitted a creditor without prior hearing to attach, and compel an employer to withhold, one-half of a debtor's wages pending a court order. The Supreme Court found such summary proceedings invalid save in "extraordinary situations" since, affording neither advance notice nor hearing, they violated due process protections. The trail-blazing implications of *Sniadach* triggered an important series of cases, both federal and state, in the creditor-debtor field. In 1972 the Supreme Court, addressing Florida and Pennsylvania claim and delivery statutes, spoke again in Fuentes v. Shevin (1972) 407 U.S. 67, to the effect that advance notice and a hearing were requisite due process elements before property could be taken. Significantly for our purposes the high court declined in *Fuentes* to recognize distinctions of grade in the character of the affected property interests, concluding that "[*a*]*ny significant taking of property by the State is within the purview of the Due Process Clause.* While the length and consequent severity of a deprivation may be another factor to weigh in determining the appropriate form of hearing, it is not decisive of the basic right to a prior hearing of some kind." (P. 86, italics added.) The Fourteenth Amendment extends its "protection to '*any* significant property interest'." (*Ibid,* italics added.)

California courts quickly caught the *Sniadach* signal. Thus in 1970 in McCallop v. Carberry (1970) 1 Cal.3d 903,

and Cline v. Credit Bureau of Santa Clara Valley (1970) 1 Cal.3d 908, we invalidated on similar due process grounds the California wage garnishment law because the legislation did not provide for notice and prior hearing. (Code Civ. Proc., § 690.11.) The following year in Blair v. Pitchess (1971) 5 Cal.3d 258, we declared unconstitutional on similar grounds the statutory claim and delivery procedure. (Code Civ. Proc., §§ 509-521.) This was soon followed by Randone v. [830] Appellate Department (1971) 5 Cal.3d 536, in which we struck down the California attachment statute. (*Id.*, § 537, subd. 1.) Numerous other federal and state cases have followed the trend. By consistent reasoning California courts have either found unconstitutional or substantially limited, as violative of due process standards, such creditor's remedies as: garageman's lien (Adams v. Department of Motor Vehicles (1974) 11 Cal.3d 146); banker's lien (Kruger v. Wells Fargo Bank (1974) 11 Cal.3d 352); unlawful detainer (Damazo v. MacIntyre (1972) 26 Cal.App.3d 18, hg. den.; Gray v. Whitmore (1971) 17 Cal. App.3d 1, hg. den.); dispossession of realty (Mihans v. Municipal Court (1970) 7 Cal.App.3d 479); see also innkeeper's lien (Klim v. Jones (N.D.Cal. 1970) 315 F.Supp. 109; Collins v. Viceroy Hotel Corporation (N.D.Ill. 1972) 338 F.Supp. 390); and imprisonment of judgment debtor (Desmond v. Hachey (D.Me. 1970) 315 F.Supp. 328).

In 1972, the United States Supreme Court in *Fuentes* seemed to have adopted a strict requirement that when a property right was taken or impaired there must be a *prior* notice and opportunity to be heard. This more severe and restrictive interpretation was tempered somewhat in 1974 by the high court's ruling in *Mitchell v. W. T. Grant Co.* (1974) 416 U.S. 600. In *Mitchell* the court reviewed and upheld a Louisiana sequestration statute which it found

significantly different from the replevin statutes of Florida and Pennsylvania invalidated in *Fuentes*. In *Mitchell* the affidavit supporting the possessory writ required the vendor-claimant to furnish detailed information regarding his claim, the writ was reviewed and issued by a judge rather than a clerk, the claimant's possessory right arose from a statutory vendor's lien giving him possession on default, and the debtor was given an *immediate* statutorily created *post*-seizure hearing on the merits of the claim. Thus, the *Fuentes* preseizure hearing stricture was moderated somewhat by *Mitchell* while the high court stressed the vital protection afforded by a *judge* in the exercise of the creditor's remedy.

The Supreme Court's most recent expression of the due process requirements is *North Georgia,* in which it held unconstitutional Georgia's garnishment statute on the expressed grounds that it permitted a taking of the debtor's property "*without . . . opportunity for an early hearing and without participation by a judicial officer.*" (419 U.S. 601 at p. 606, italics added.) The high tribunal emphasized [831] that under Georgia law the writ of garnishment was issuable "by the court clerk, without participation by a judge," and "the only method discernible on the face of the statute to dissolve the garnishment was to file a bond to protect the plaintiff creditor." (*Id.*, at p. 607.) The court further observed that "There is no provision for *an early hearing* at which the creditor would be required to demonstrate at least probable cause for the garnishment. Indeed, it would appear that without the filing of a bond the defendants debtor's challenge to the garnishment will not be entertained, whatever the grounds may be." (*Ibid.*, italics added.) Holding that this was entirely unacceptable, the high court expressly distinguished its decision in *Mitchell*

on the grounds that the Louisiana sequestration statute upheld in that case required *judicial* authorization to issue the writ, and in the court's words "expressly entitled the debtor to an *immediate* hearing after seizure and to dissolution of the writ absent proof by the creditor of the grounds on which the writ was issued." (*Ibid.*, italics added.)

Thus in *North Georgia,* in clear and unmistakable language, the United States Supreme Court faithfully continuing the consistent course inaugurated in *Sniadach* has held that a taking of property is unconstitutional, even if the taking be temporary in nature, and even if the property may be released by filing a bond, unless the *statute* contains express provisions for *prior judicial authorization and* an *early* post-taking *hearing* on the merits of the creditor's claim.

While it is true, as the majority note, that in May 1974 the United States Supreme Court summarily, and without opinion, affirmed the case of Spielman-Fond, Inc. v. Hanson's, Inc., (D.Ariz. 1973) 379 F.Supp. 997, affirmed 417 U.S. 901 (1974), a case which had upheld the constitutionality of a mechanics' lien law similar to California's, the Supreme Court's summary affirmance occurred *prior* to *North Georgia.* Accordingly, *Spielman-Fond* by well established principles has very limited force and is by no means dispositive of the very serious constitutional issue herein presented. As Chief Justice Burger has recently explained, "When we summarily affirm, without opinion, the judgment of a three-judge District Court we affirm the judgment but not necessarily the reasoning by which it was reached. [Fn. omitted.] An unexplicated summary affirmance settles the issues for the parties, and is not to be read as a renunciation by this Court of doctrines previously announced in our

opinions after full argument. Indeed, upon fuller consideration of an issue under plenary review, *the Court has not* [832] *hesitated to discard a rule which a line of summary affimances may appear to have established.* [Citations.]" (Fusari v. Steinberg (1975) 419 U.S. 379, 391-392, conc. opn. by Burger, C.J., italics added; see Edelman v. Jordan (1974) 415 U.S. 651, 670-671 ["Since we deal with a constitutional question, we are less constrained by the principle of *stare decisis* than we are in other areas of the law."]; Serrano v. Priest (1971) 5 Cal.3d 584, 616-617.)

Moreover, it is significant as the majority note that *Spielman-Fond* was decided prior to the recent decisions of two of our sister states, Connecticut and Maryland, which held the mechanics' lien laws of those states unconstitutional for reasons substantially identical to those set forth below. (See Barry Properties, Inc. v. The Fick Bros. Roofing Co. Md. 1976) ..... A.2d .....; Roundhouse Constr. Corp. v. Telesco Masons Supplies Co. (Conn. 1975) ..... A.2d .....) The courts in these two cases were, of course, aware of the Supreme Court's summary affirmance of *Spielman-Fond.* For the foregoing reasons, I suggest that we must measure the constitutionality of the California mechanics' lien and stop notice laws by the most recent requirements of the Supreme Court in *North Georgia,* rather than to speculate as to the significance of the high court's summary affirmance of an earlier proceeding.

Of perhaps even greater significance is the fact that following *North Georgia,* we ourselves in Beaudreau v. Superior Court (1975) 14 Cal.3d 448, reviewed at considerable length the appropriate due process demands when, as here, property is "taken." The *Beaudreau* analysis developed, in my view, is fully dispositive of the issue before us, for we carefully considered the essential elements of due process

protections as currently mandated. We examined the constitutionality of a statutory scheme whereby plaintiffs suing public entities were required either to file an undertaking for costs, or deposit in court a cash amount in lieu of a bond. We observed initially that a "taking" occurred either by reason of the exaction of a nonrefundable bond premium or the temporary loss of use of the cash deposit. (Pp. 455-456.) We reiterated our prior observation in Brooks v. Small Claims Court (1973) 8 Cal.3d 661, 666, that the concept of a taking "'. . . has been held to include even *temporary* deprivations of property.'" (P. 455, italics added.) Then, we explained in definitive terms that, by reason of prior decisions of the United States Supreme Court and this court, ". . . *in every case involving a deprivation of* [833] *property within the purview of the due process clause, the Constitution requires some form of notice and a hearing.* [Citations.] Absent *extraordinary* circumstances justifying resort to summary procedures, this hearing must take place *before* an individual is deprived of a significant property interest. [Citations.] The fact that the individual may later recover the property if he prevails at a post-deprivation hearing does not satisfy constitutional requirements. '[A] temporary, nonfinal deprivation of property is nonetheless a "deprivation" in the terms of the Fourteenth Amendment, and . . . must be *preceded* by a fair hearing.' [Citation.]" (P. 458, italics added.)

Next, in *Beaudreau* we spoke of the scope and purpose of the required hearing in the following language: ". . . the taking to which a plaintiff is subjected under the above [security bond] statutes must be preceded by a hearing in the particular case in order to determine whether the statutory purpose is promoted by the imposition of the undertaking requirement. . . . [A] due process hearing would

necessarily inquire into the merit of the plaintiff's action as well as into the reasonableness of the amount of the undertaking in the light of the defendant's probable expenses." (P. 460.)

We concluded that the challenged statutes were invalid for failing to provide such a due process hearing. We emphasized that "The statutes before us make no provision for such a hearing." (P. 460.) As will be developed below, it is noteworthy that we did not attempt to "read into" the statutes a procedure for a probable cause type of hearing. Nor did we suggest that the general declaratory relief or injunction laws offered a satisfactory alternative or substitute for the probable cause hearing required by due process principles. We rejected the contention that the Supreme Court's decisions in *North Georgia* and *Mitchell* represented a significant retreat from the high court's former position. Finally, lest there be any lingering doubt, in definitive and crystal clear language, we expressed the central constitutional principle extracted from *North Georgia* which thereafter was to characterize California procedural due process requirements. Our unanimous expression, just a year ago, was that *North Georgia* ". . . *establishes that where state law authorizes one litigant to take the property of his adversary, the due process clause of the United States Constitution at the least requires judicial participation in the initial taking decision and 'an early hearing' at which the party imposing the taking demonstrates probable cause to justify it.*" (P. 465, italics added.) Our *Beaudreau* language was plain, simple, and unambiguous, and I believe I am not alone in my interpretation of the foregoing [834] language. (See Comment, 89 Harv.L.Rev. 1006, 1015-1016; Comment, 21 Villanova L.Rev. 282.)

Do the California statutory provisions for mechanics' liens and private stop notices meet the *North Georgia* and *Beaudreau* standards of (a) judicial participation in the taking, and (b) an early probable cause hearing? Clearly not. These laws not only fail to meet both requirements, they, in fact, fail to meet either. It is abundantly clear that a mechanics' lien may be perfected and a private stop notice filed without judicial approval or review of any kind, shape or form. The statutes are absolutely silent on the point. The protection of judicial intervention is not contemplated, required, or allowed. Furthermore, no provision is made for an *early* hearing at which the debtor may obtain release of the lien on his real property or stop notice upon his construction loan in the event of the failure of the creditor to establish probable cause to support his claim. Rather, the creditor has 90 days from *recording* of the claim of lien to institute his suit to foreclose the mechanics' lien. (Civ. Code, § 3144.) He also has 90 days following expiration of the lien-recording period within which to file suit to enforce his stop notice claim. (*Id.*, § 3172.) As in *North Georgia*, the only method discernable on the face of the California statute by which release of either a mechanics' lien or private stop notice may be obtained is by the filing of a surety bond. (*Id.*, §§ 3143, 3171.)

Thus, the present California creditor's procedures violate each of the essential principles enunciated in *North Georgia* and reaffirmed by us last year in *Beaudreau*. The procedural pattern for enforcement of the creditor's remedies under both Georgia and California statutes is so very similar as to make both persuasive and controlling the Supreme Court's language in *North Georgia*. Further, I find it impossible to square the majority reasoning with the express and detailed imperatives of *Beaudreau*. This discord between the theme expressed by the majority and the clear lessons of *North Georgia* and *Beaudreau* arises, I suggest, from the majority's failure to accept the principle that the demands of procedural due process are so fundamental as to transcend variances in kinds of properties and types of creditors or debtors.

While not conceding this lack of harmony, the majority, conducting a search for procedural alternatives, attempt to salvage the California statutes by noting the availability of relief under California's general injunctive or declaratory relief laws, arguing that resort to them will [835] afford the debtor a substitute right which is the equivalent of the early hearing mandated by *North Georgia*. This argument must fail for at least two reasons. It runs afoul of a clearly expressed legislative intent and, assuming general injunctive or declaratory relief is available, such relief would be inadequate under *North Georgia*.

As previously indicated both the mechanics' lien and private stop notice laws on their face disclose an intent to preclude an early post-taking hearing on the merits of the creditor's claim. On the contrary, the legislation clearly contemplates a *summary* remedy in which the debtor's property interest is taken, followed by the initiation and prosecution within 90 days of a lawsuit by the creditor to enforce the lien or stop notice claim; only by posting a bond can the debtor achieve an early release of the lien or stop notice. As noted, the legislation nowhere provides for any probable cause type of hearing.

The foregoing procedure in the area of *private* construction contrasts sharply with the summary hearing proceedings available for the enforcement in the *public* works area of claims on which a *stop notice* is based. (Civ. Code, §§ 3197-3205.) In the public works sector the claimant, the

contractor, and the public entity, may avail themselves of a special early hearing procedure to resolve any conflicts and to determine the propriety of the stop notice. This mandatory hearing is built into the statutes and, in anticipation of *North Georgia* and *Beaudreau,* it is a *court* hearing which must occur within 15 days of demand. This latter statutory procedure would, of course, be at least partially superfluous if, as the majority now contend, such a hearing is available in any event in both private and public sectors through the procedural injection of general injunctive and declaratory relief actions. Thus, the majority thesis contains an inherent internal inconsistency, and violates sound principles of statutory construction. It seems apparent to me that the statutory pattern created by these two creditor's remedies discloses a legislative intent to differentiate between private and public construction, making available as to stop notices only in the latter those special due process protections afforded by section 3197 et seq. As the general mechanics' lien laws and stop notice provisions do not apply to public works (Civ. Code, §§ 3109, 3156) so the special judicial hearing protection afforded by Civil Code section 3179 does not apply to private construction.

Nor is the foregoing effect altered in any way by the 20-day advance notice requirement for mechanics' liens (Civ. Code, §§ 3097-3114). The [836] notice simply alerts the debtor that the axe is to fall. It neither stays the axe nor provides a statutory means of doing so. It constitutes neither judicial intervention nor hearing.

The majority urge application of a rule that courts "must construe legislation to uphold its validity," citing Braxton v. Municipal Court (1973) 10 Cal.3d 138, 145, and In re Kay (1970) 1 Cal.3d 930, 942. This interpretive rule,

however, is subject to important qualifications. Both *Braxton* and *Kay* recognize that our construction of legislation must be "consistent with the statutory language and purpose" (*Kay,* at p. 942) and be otherwise "fair and reasonable" (*Braxton,* at p. 145). In other words, we cannot, in the course of attempting to uphold a statute, adopt a construction which is at odds with the Legislature's probable intent. For the reasons above expressed, it seems evident that the Legislature in its wisdom did not intend to afford debtors on private construction projects that prompt hearing expressly afforded to debtors who suffer a stop notice in the public sector.

Indeed, it is highly significant that while the majority argue that procedural due process requirements are met because a private debtor may obtain a prompt post-taking hearing by means of the general provisions governing injunctions and declaratory relief, they cite no controlling or persuasive precedent which so holds. The two authorities cited by the majority (People v. Paramount Citrus Assn. (1957) 147 Cal.App.2d 399, 413; 2 Witkin, Cal Procedure (2d ed. 1970) pp. 1515-1516) discuss only the general power of courts to issue mandatory or prohibitory injunctions. They do not pertain at all to the critical question whether such independent relief if sought and obtained constitutes a sufficient substitute for procedural due process. In fact, the court in *Paramount* (in construing Agr. Code provisions for enforcement of marketing orders) expressed the familiar reasoning that "If it had been the legislative intent to empower a court to make an order which in effect compels specific performance of the obligations imposed by a marketing order, *the Legislature would have, by apt language, expressly conferred that power.*" (P. 412, italics added.) Similarly, it may be said that had the Legislature

in the matter before us intended to provide for a prompt post-taking hearing comparable to the procedure which it had provided for stop notices in the public area, it would, and easily could, have expressly done so, and treated both private and public sectors alike. [837]

Further, in my view, it is not without meaning that in *North Georgia* the Supreme Court emphasized the absence of any *express* hearing provision in Georgia's garnishment laws (419 U.S. 601 at pp. 606-607) without suggesting in any manner that Georgia's *general* injunctive or declaratory relief laws might cure the glaring constitutional defects. Similarly in *Beaudreau,* we noted that "the statutory schemes" reviewed by the Supreme Court in Arnett v. Kennedy (1974) 416 U.S. 134, 145, and Mitchell v. W. T. Grant Co., *supra,* 416 U.S. 600 at page 610, provided for hearings. In contrast, the provisions of Government Code sections 947 and 851, before us in *Beaudreau* did not so provide. Significantly, we did not attempt to support the offending statute by resort to the general injunctive or declaratory relief laws to which the majority now tenaciously cling.

Even, however, were we to assume that general injunctive or declaratory relief laws furnished the debtor with an alternative to an express hearing, these remedies would be wholly inadequate substitutes for the unqualified right to an early hearing guaranteed by due process principles. First, in order to obtain any immediate relief under these general laws, the debtor is required to hire an attorney, prepare, file and serve a civil complaint, issue and serve summons, obtain and post an injunction bond (Code Civ. Proc., § 529) and cause to be issued and served the requisite restraining order or order to show cause, the latter procedures substantially equivalent to the release-of-garnishment condemned in *North Georgia.* In addition to his attorney's fees the debtor must pay the filing fees and the premium for the bond. As indicated above, in *Beaudreau* we invalidated a like bond requirement on the basis that it constituted a taking of property without a prompt post-taking hearing. Second, as we recently observed in Adams v. Department of Motor Vehicles, *supra,* 11 Cal.3d 146, 156, involving a garageman's lien, the availability of precisely the same injunctive or declaratory relief to discharge a possessory lien was held by us to be an inadequate remedy in view of the lack of assurance that a speedy hearing will in fact take place. We used the following significant language in *Adams,* "California law does not provide for accelerated hearing of contested lien claims, and only by resort to temporary restraining orders and injunctions could sale and transfer [of the automobile] be halted pending adjudication, at least if events take their ordinary course. Since temporary injunction is an extraordinary remedy and is thus discretionary [citation], *it lacks the certainty necessary to insure a hearing prior to permanent deprivation.*" [838] (P. 156, italics added.) Although, theoretically, no "permanent deprivation" of the property owner's interests can occur until the mechanic's lienholder proves his claim (*ante,* p. ...., circ. opn., p. 32, fn. 17), the consequences of exercise of the creditor's remedy from a due process standpoint are serious, property is taken, and in terms of its effect on the debtor the lien in the words of the majority "may severely hamper his ability to sell or encumber that property" (*ante,* p. ...., circ. opn., p. 12). As to the stop notice even a slight delay in releasing frozen construction funds can destroy the project and result in the debtor's loss of his property (*ante,* p. ...., circ. opn., p. 15).

The severe and adverse consequences of the challenged laws upon debtors, and the lack of adequate procedural

safeguards have not gone unnoticed by the academic commentators. Two recent analyses, measuring the questioned procedures against current constitutional imperatives, have concluded that mechanics' lien laws generally (Comment, *The Constitutional Validity of Mechanics' Liens Under the Due Process Clause—A Reexamination after Mitchell and North Georgia* (1975) 55 B.U.L.Rev. 263, 286-287) and California's private stop notice law in particular (Note, *California's Private Stop Notice Law: Due Process Requirements* (1974) 25 Hastings L.J., 1043, 1073, 1074) fail to pass due process scrutiny and are, accordingly, unconstitutional.

In determining whether the mechanics' lien and private stop notice remedies can survive constitutional attack, the majority stress that we are to identify, balance, and accommodate the competing interests, the purpose of which, as the majority envision it, as to mechanics' liens, is to determine whether the result represents "a significant deprivation."

It is difficult to determine precisely how the majority conceive or characterize the effect on the debtor of the creditor's remedy. They reject the thought that the effect on the debtor is "de minimus" (*ante,* p. , circ. opn., pp. 12, 14), and are forced to acknowledge that as to the lien, "it may severely hamper his ability to sell or encumber that property," and that as to the stop notice the debtor "may be forced into default" and "consequently lose his property" (*ante,* p. , circ. opn., p. 15), thereby resulting in the taking of a "significant property interest" (*ante,* p. , circ. opn., p. 16). Nonetheless, this *significant* taking when weighed in the hands of the majority is determined by them to be "of relatively minor effect" since the mechanics' lien denies neither possession nor use to the debtor, and the

stop notice "attaches only to a limited line of credit." Thus, while the majority's precise placement of the debtor's property interests is uncertain, it may be fixed roughly, by a [839] process of semantic triangulation, pas "de minimus," and at once—"significant" and "relatively minor."

With all due deference, I suggest there is an aura of complete unreality about the suggestion that imposition on a debtor's property of a mechanics' lien, or the placing of a stop notice on his construction loan, has a "relatively minor" effect. Quite to the contrary, a mechanics' lien most certainly intrudes, and in a *major* way, upon his incidents of ownership. Following imposition of the mechanics' lien, the debtor may enjoy his fireplace but he may not sell his home. He may tend his garden, but he may not borrow on his property. His title is clouded and although his occupancy is permitted, two very fundamental rights of sale at full cash value and hypothecation are instantly impaired and restricted. As the majority concede, imposition of the mechanics' lien "may severely hamper his ability to sell or encumber" his residence. (*Ante,* p. , circ. opn., p. 12.) To the average debtor whose home is usually his principal asset, this constitutes no small cloud on his financial horizon but a serious and real impairment to him, his family and his life savings. There is nothing "minor" about its impact. Exercise by the creditor of the mechanics' lien remedy poses a threat pointed directly at the vitals of the debtor's economic independence. This is not imaginary but real and its effect is immediate.

The same may be said of a stop notice. The debtor, be he homeowner or owner of a business, having negotiated a construction or home improvement loan may, upon the creditor's exercise of the stop notice remedy, frequently, if not usually, find himself in mid-construction with work halt-

ed, his property encumbered with debt and an uncompleted building or residence. The attendant delay, expense, and uncertainty are by no means minimal. They are equally threatening. The majority concede as much by acknowledging that the filing of a stop notice is a "form of garnishment, a form of seizure that Randone v. Appellate Department, *supra,* 5 Cal.3d 536, 552 held a 'taking' of property." (*Ante,* p. , circ. opn., p. 14.) As the majority concede, the debtor "may be forced into default on the loan, and consequently lose his property." (*Ante,* p. , circ. opn., p. 15.) This is not "minor." These important effects occur not alone in a commercial setting. Their weight falls most heavily on the small homeowner and the import of the creditor's action upon him far from being minimal is very serious indeed.

The majority place principal emphasis on the claim that in the case of a mechanics' lien or materialman's lien, the laborer and materialman [840] have acquired an "interest" in the property since their work and materials have enhanced the value of that property. Moreover, the majority contend, in the case of the private stop notice, that although the laborer or materialman has not directly enhanced the value of the loan fund, nevertheless by enhancing the value of the realty, they have increased the value of the security of the loan fund. These considerations, it is urged, justify enfolding laborers and materialmen within a "protective policy" which gives them a more preferred status in the constitutional debate. The argument, reduced to its essentials, is that the more direct and valuable the creditor's contribution to the property, the more elevated his constitutional position and the lesser the degree of the procedural due process afforded the debtor. Through this reasoning the judicial scales become, conceptually, a constitutional "teeter totter," by which the higher the creditor is lifted at

his end of the legal seesaw, the lower becomes the due process protections extended to the debtor. I cannot agree.

Preliminarily, it may be noted the majority's principal thesis, that the laborer or materialman has "acquired an interest" in the property by enhancing its value, assumes a fact which is "not in evidence." On close examination it will be seen that the majority decide, ipse dixit, the very issue which the due process hearing is intended to resolve. In almost all disputes of this nature, the creditor alleges improvement of the property and the debtor alleges that the creditor has failed to perform in a satisfactory manner the work contracted for; thus, the dispute, and the necessity for the hearing, the precise purpose of which is to decide whether or not, and to what extent, the value of the property really has been enhanced. Yet the majority assume the conclusion that there has been an enhancement, thereby depriving the debtor through a prompt, post-taking hearing, constitutionally required, of the opportunity of showing that no improvement has occurred or that if it does it is of substantially lessened value. Thus the hearing required to establish the nature, if any, of the benefit, enhancement, or improvement is circumvented because the creditor has "improved" the property. In short, the principal reliance of the majority is based upon a factual premise which cannot be established without the very hearing, which the majority flatly deny to the debtor-owner. Thus a conclusive presumption of improvement is created thereby obviating a hearing. I respectfully suggest that such an effect is unconstitutional and the reasoning by which it is reached is circular and illogical. [841]

Moreover, it is evident that the laborer's or materialman's "interest" in the subject property does not justify dispensing with the debtor's due process protection of (1)

prior judicial participation and (2) early post-taking hearing. In Mitchell v. W. T. Grant Co., *supra,* 416 U.S. 600, the claimant-vendor likewise had an interest in the lien property vis-a-vis the buyer. As the Supreme Court noted in *Mitchell,* "The reality is that both seller and buyer had current, real interests in the property . . . ." (P. 604.) Yet, in accommodating those interests, the Supreme Court in *Mitchell* upheld the challenged sequestration law only because that law provided, first, for judicial participation in the issuance of the writ, and second, for an immediate post-seizure hearing on the merits of the claim. Surely a laborer's or materialman's interest in the liened property entitles him to no greater preference or protection than that accorded the vendor-owner claimant in *Mitchell.*

The majority rely upon Beaudreau v. Superior Court, *supra,* 14 Cal.3d 448, for their major premise that, when competing interests of creditor and debtor are involved, resolution of the due process issue requires an accommodation of those interests. As an abstract proposition, we generally weigh the competing interests of the parties in determining which should prevail. In the context of due process, however, *Beaudreau* expressly recognizes that the due process clause ". . . *at the least* requires judicial participation in the initial taking decision and 'an early hearing' at which the party imposing the taking demonstrates probable cause to justify it." (P. 465, italics added.) Under the constitutional limits as defined in *Beaudreau, Mitchell* and *North Georgia,* these fundamental minimum due process protections cannot be "balanced" out of existence in attempting to "accommodate" the respective interests of the parties. In this sense, the fundamental elements of procedural due process are *not* negotiable for the critical elements of a significant taking of property are present.

The majority rely upon Adams v. Department of Motor Vehicles, *supra,* 11 Cal.3d 146, for the general proposition that the propriety of weighing the competing interests of debtor and creditor must be recognized in resolving due process questions. It is significant, however, that as explained in *Adams* since the garageman-creditor in that case had already obtained the *right to possession* of the automobile when he asserted his lien, and no further assistance from state officials was required to retain possession of the vehicle, it would constitute a violation of *the garageman's* due process rights to deprive him of his [842] possessory lien. (Pp. 154-155.) The challenged mechanics' lien and stop notice laws before us do not, of course, involve such possessory liens.

It is contended that a ". . . state policy strongly supports the preservation of laws which give the laborer and materialman security for their claims." (*Ante,* at p. 42.) They then consider the "social effect" of the liens measured against the detriment occasioned to the debtor, determine that "[t]he balance tips in favor of the worker and materialman," and hold that, accordingly, the "safeguards" afforded the debtor meet due process demands. (*Ante,* at p. 43.)

I find no support whatever in *North Georgia* for the kind of preference that is proposed by the majority based either on the nature of the creditor's claim or the character of the property affected or any "social effect" thereby occasioned. Indeed, a similar argument was made, and flatly rejected, in *North Georgia* itself. There, respondent argued for similar preferential treatment urging that a different standard should be employed in measuring the validity of laws directed against corporate bank accounts as compared with those affecting householders and other

"victims of contracts of adhesion." The Supreme Court rejected the proposed distinction because ". . . the probability of irreparable injury . . . is sufficiently great so that some procedures are necessary to guard against the risk of initial error. *We are no more inclined now than we have been in the past to distinguish among different kinds of property in applying the Due Process Clause.*" (419 U.S. 601, at p. 608, italics added.)

The fact that the mechanics' and materialman's lien laws are of ancient origin and acceptance makes, in my view, all the more significant the fact that, to my knowledge, not once has it been asserted, much less held until now, that artisans and materialmen held a special, favored, or preferred creditor status in a *constitutional* sense, reducing thereby to a "minimal" character the due process safeguards extended to debtors.

Beginning with *Sniadach,* the only recognized exception to the requirements of notice, hearing, and judicial interposition, has been the relatively rare instance of an "extraordinary situation requiring special protection of a state or creditor interest." No demonstrated "extraordinary situation" appears herein. As expressed in the Note, *California's Private Stop Notice Law: Due Process Requirements, supra,* 25 Hastings L.J., at page 1070, courts have recognized three kinds of extraordinary [843] circumstances: "[W]hen the public is in great physical or financial danger, when there is a significant risk that a criminal defendant will abscond, and when a civil defendant will escape the effects of a potential adverse judgment unless his property is seized immediately." In my view, none of these narrowly conceived exceptions applies to the mechanics' lien or stop notice situation. The well accepted principles of preference extended mechanics, artisans, and

materialmen, recognized both in the Constitution and by statute, permit priorities vis-a-vis other creditors. They cannot, however, impair or dilute the fundamental procedural due process protections afforded debtors by the Fifth and Fourteenth Amendment to the federal Constitution, and article I, section 13, of the California Constitution. The debtor's property remains an appropriate target for the creditor, but it may be reached only through constitutionally permissible methods affording the debtor the twin protections of judicial intervention and early hearing.

In summary, in an important series of cases following *Sniadach* a number of creditor's remedies have been invalidated on due process grounds. The underlying reasoning of these cases is equally applicable to the California mechanics' lien and stop notice legislation which demonstrably lack those procedural safeguards required by *North Georgia* and *Beaudreau,* the most recent expressions of due process principles in this area. We ourselves have described the *Sniadach* holding as "*not* a revulet of wage garnishment but part of the mainstream of the past procedural due process decisions of the United States Supreme Court." (Randone v. Appellate Department, *supra,* 5 Cal.3d 536, at p. 550, italics added.) To this I stress the importance of a metaphorical extension—this broad flood of Fourteenth Amendment protections and safeguards is diverted or broken by no islands of special privilege or immunity that rise above its constitutionally cleansing wash.

Due process principles demand even-handed, impartial, and consistent application. The constitutional sword cuts both ways. Its sweep recognizes no preferences. The wage earner under *Randone* is the beneficiary of full procedural due process protection before his wages are attached. When, however, as a creditor in turn he asserts his own lien or

private stop notice claim he may not be heard to complain if similar protections are afforded to a debtor substantially affected by his claim. Both the burdens and blessings of those fundamental constitutional guarantees apply not to some but to all. They do not admit of partial application, or bending of principle. For us to conclude otherwise, it [844] seems to me, is to accept a form of *selective* due process which is unfair, illogical, arbitrary and dangerous.

Because they lack provision for judicial participation and an early hearing, I think the California laws concerning both mechanics' liens and private stop notices are unconstitutional in their present form and would so hold.

/s/ RICHARDSON, J.

WE CONCUR:
/s/ McCOMB, J.
/s/ CLARK, J.

Appendix B

116 Cal. Rptr. 191

CERTIFIED FOR PUBLICATION

In The Court of Appeal
State of California
Fifth Appellate District

5 Civil No. 2057

Connolly Development, Inc. et al.,
Petitioners,

v.

The Superior Court of Merced County,
Respondent,
Diamond International Corporation,
Real Party in Interest.

[September 3, 1974]

OPINION

PROCEEDING in prohibition. Petition granted in part and denied in part.

Orr, Wendel & Lawlor, Eugene K. Lawlor and Jacob Levitan for Petitioners.

No appearance for Respondent.

Russell H. McLain and Norman S. Stimmel for Real Party in Interest.

Munns, Kofford, Hoffman, Hunt & Throckmorton, Gordon Hunt and Ralph W. Hoffman as Amici Curiae on behalf of Real Party in Interest.

[193] Petitioners herein challenge the constitutional validity of the California mechanics' lien and stop notice provisions as set forth in article XX, section 15, of the California Constitution and chapters 2 and 3, title 15, part 4, division 3 of the Civil Code. This is yet another in a continuum of cases calling into question the validity of summary prejudgment creditors' remedies under the procedural due process clauses of the California and federal Constitution, following the decision in *Sniadach v. Family Finance Corp.* (1969) 395 U.S. 337 and its progeny. *Sniadach* held that Wisconsin's prejudgment wage garnishment statute was unconstitutional since it permitted the garnishment of the debtors' wages without prior notice and a hearing. *Randone v. Appellate Department* (1971) 5 Cal.3d 536 (cert. den. 407 U.S. 924) explains: "The recent line of cases, commencing with *Sniadach,* reaffirms the principle that an individual must be afforded notice and an opportunity for a hearing before he is deprived of any significant property interest, and that exceptions to this principle can only be justified in 'extraordinary circumstances' " (at p. 541) and ". . . rather than creating a special constitutional rule for wages the *Sniadach* opinion returned the entire domain of prejudgment remedies to the long-standing procedural due process principle which dictates that, except in extraordinary circumstances, an individual may not be deprived of his life, liberty or property without notice and hearing" (at p. 547). Finally, the decision makes clear that the same principles apply though the deprivation only be temporary. (See pp. 551, 552.)

Under the California statutory scheme, materialmen and other persons defined in Civil Code section 3110[1] who furnish

labor or materials at the instance of the owner or the owner's contractor upon a "work of improvement" are entitled to file a mechanic's lien upon the property upon which the work of improvement is located. A materialman must file a preliminary notice with the owner, the general contractor and the construction lender within 20 days after furnishing the materials (§§ 3097, 3114) and thereafter record in the office of the county recorder the claim of lien within 90 days of the completion of the work of improvement, or, if a notice of completion or notice of cessation of work is recorded, then within 30 days of such notice (§§ 3092, 3093, 3116).

The lien constitutes a direct lien (§ 3123) on the improvement and the real property to the extent of the interest of the owner or the one who caused the work of improvement to be constructed (§§ 3128, 3129) and takes priority over the encumbrances attaching subsequent to the "commencement of the work of improvement" (§§ 3134, 3138).

The owner may cause the lien to be released by posting a bond equal to one and one-half times the amount of the lien (§ 3143). The lien terminates unless an action to enforce it is commenced within ninety days of the completion of the im-[194]provement (§ 3144) and such action is subject to discretionary dismissal if not brought to trial within two years (§ 3147).

Though the statutory provisions pertaining to the stop notice are contained in the same title as the Mechanics' Lien Law, the rights and remedies created are independent of and cumulative to mechanics' lien rights. (*Bohannan Bros., Inc. v. Lo Jean Dev. Co.* (1969) 3 Cal.App.3d 200, 205.)

The stop notice claimant must give the twenty-day preliminary notice (§§ 3097, 3160) and then serve on the con-

1. All references will be to the Civil Code unless otherwise indicated.

struction lender within the time a mechanic's lien may be filed (§ 3159) his notice to withhold funds. Upon receipt of a bonded stop notice carrying a bond equal to one and one-fourth times the amount claimed (§ 3083), the construction lender is required to set aside funds from the borrower (owner), or any other person to whom the lender is obligated, to make payments sufficient to answer the stop notice claim unless a payment bond has been recorded (§§ 3162, 3235). The stop notice may be released by posting a bond in an amount equal to one and one-fourth times the amount stated in the notice (§ 3171). An action must be commenced to enforce payment of the amount claimed in the stop notice between ten and ninety days after filing (§ 3172) and is subject to discretionary dismissal if not brought to trial within two years (§ 3173).

Turning to the facts in the instant proceeding, Connolly Development, Inc. ("Connolly") as owner and developer of a shopping center in the city of Los Banos, entered into a construction contract with Ralph E. Carlsen Construction Co. ("Carlsen") to construct the work of improvement and arranged with Union Bank ("Bank") for a construction loan to finance the improvement. Diamond International Corporation ("Diamond"), at the request of Carlsen, furnished materials for the shopping center for which on February 15, 1973, after complying with the preliminary notice requirements, a mechanics' lien for $6,727.84 was duly recorded and on February 22, 1973, it filed a bonded stop notice in the same amount with the Bank.

Thereafter Diamond filed a timely complaint to foreclose the mechanic's lien (first cause of action) and to enforce the stop notice (second cause of action). Connolly and the Bank demurred to the complaint on the ground the mechanic's lien and stop notice were violative of procedural due process, which demurrer was overruled. Connolly and

the Bank thereupon petitioned this court for a writ of mandate and/or prohibition praying that the trial court be directed to dismiss the complaint or prohibited from further proceedings in said action. We entertained the writ because of the public importance of the issues involved. (*Mooney v. Pickett* (1971) 4 Cal.3d 669, 674-675.)

STATE ACTION

Initially Diamond contends that any taking represented by filing a mechanic's lien and stop notice does not involve the significant state action required to invoke the protection of the Constitution (*Evans v. Newton* (1966) 382 U.S. 296, 299-300) since the seizure is not made by a state officer or pursuant to court process. However, the recent case of *Adams v. Department of Motor Vehicles* (1974) 11 Cal.3d 146 is to the contrary and is dispositive of this issue. In *Adams* the court held that action undertaken by a private individual in retaining possession of and selling a customer's vehicle pursuant to the garageman's lien (see § 3067 et seq.) was state action. In so holding the court relied on three principal factors: ". . . the lien is expressly provided for by statute, its execution by sale is authorized by statute and a state agency oversees the sale and records the transfer of title." (11 Cal.3d at p. 153.)

Applying these principles, the Mechanic's Lien Law clearly constitutes state action. [195] First, the lien is thoroughly regulated by constitutional and statutory provisions. Secondly, in order to "enforce a lien" it must, as in *Adams, supra,* be recorded with a state agency, in this case the county recorder. If it is not, so recorded within the time prescribed by statute, it is of no force and effect. (§ 3116; see *L. W. Blinn Co. v. American C. P. Co.* (1921) 51 Cal. App. 479, 481.) Thirdly, court action is necessary to enforce the lien, for if no action is taken within the time allowed the lien expires. (§ 3144.)

While there is less state involvement in the filing and perfecting of a stop notice in that it is not required to be recorded or filed with any public office before it becomes effective, the right was nonexistent at common law and the provisions of the statute compel the construction lender to withhold the funds under threat of a judgment for the amount claimed in the stop notice. "This is not just action against a backdrop of an amorphous state policy, but is instead action encouraged, indeed only made possible, by explicit state authorization." (*Klim v. Jones* (N.D. Cal. 1970) 315 F.Supp. 109, 114.) As was stated in *United States v. Classic* (1941) 313 U.S. 299, 326: "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." Accordingly, it has been held in similar situations that statutes which create a private remedy of summary seizure do constitute state action. (*Hall v. Garson* (5th Cir. 1970) 430 F.2d 430, 438-440 (landlord's lien); *Dielen v. Levine* (D.Neb. 1972) 344 F.Supp. 823, 824 (same); *Klim v. Jones, supra,* 315 F.Supp. 109, 114-115 (innkeeper's lien).) We agree with those pronouncements.

MECHANIC'S LIEN

Taking a cue from *Sniadach,* the courts have embarked upon a series of decisions holding that various prejudgment remedies are constitutionally infirm. (See *Adams v. Department of Motor Vehicles* (1974) 11 Cal.3d 146 (that portion of garageman's lien permitting foreclosure and sale on a customer's car without a prior hearing); *Randone v. Appellate Department* (1971) 5 Cal.3d 536 (garnishment of bank account); *Blair v. Pitchess* (1971) 5 Cal.3d 258 (claim and delivery law); *McCallop v. Carberry* (1970) 1

Cal.3d 903 (attachment of wages); *Damazo v. MacIntyre* (1972) 26 Cal.App.3d 18, 24 (attachment in unlawful detainer action); *People* ex rel. *Younger v. Allstate Leasing Corp.* (1972) 24 Cal.App.3d 973, 975-976 (attachment of money due the state or a political subdivision upon an obligation or penalty imposed by law); *Gray v. Whitmore* (1971) 17 Cal.App.3d 1 (landlord's lien); *Mihans v. Municipal Court* (1970) 7 Cal.App.3d 479 (writ of possession in unlawful detainer actions).) Subsequent to *Sniadach,* in *Fuentes v. Shevin* (1972) 407 U.S. 67, the Supreme Court held in a four to three decision that prejudgment replevin statutes requiring no prior hearing before the seizure of goods were likewise unconstitutional.[2]

Exceptions to the due process requirement of notice and opportunity for a [196] hearing before a person is deprived of any significant property interest "can only be justified in 'extraordinary circumstances'" (*Randone v. Appellate Department, supra,* 5 Cal.3d 536, 541) "'. . . where some valid governmental interest is at stake that justifies postponing the hearing until after the event'" (*Fuentes v. Shevin, supra,* 407 U.S. at p. 82; see also *Randone v. Appellate Department, supra,* 5 Cal.3d 536, 552-553; *Blair v. Pitchess, supra,* 5 Cal.3d 258, 277-279.) Thus whether or not a prior hearing is required in a given situation is dependent upon a judicial weighing of the seriousness of the

2. However, in *Mitchell v. W. T. Grant Co.* (1974) ..... U.S. ..... [94 S.Ct. 1895], the Supreme Court, in a five to four decision, held that the Louisiana sequestration statutes were not unconstitutional. The majority purportedly distinguished *Fuentes v. Shevin, supra,* but the four dissenting justices, as well as one concurring justice, clearly indicated that *Fuentes* should be considered overruled. Accordingly, although the sequestration statute upheld in *Mitchell* is distinguishable from the Mechanics' Lien Law in several material respects, it seems apparent that the floodgates have started to close and that *Sniadach* and its offspring will probably be limited by the Supreme Court of the United States.

deprivation against the importance of a governmental or public interest served by the summary process. (*Boddie v. Connecticut* (1971) 401 U.S. 371, 377-379.) Accordingly, the standard remains a flexible one requiring courts to weigh the competing interests in determining what type of safeguards due process requires.

Varied forms and applications of this "balancing process" are found in virtually every decision following *Sniadach*. Factors which these cases have indicated should be taken into consideration include whether the creditor has a possessory interest in the property allegedly "taken" by virtue of his adding labor or materials "to which he originally had a right of possession in"; whether the invocation of the remedy works a change of possession (*Adams v. Department of Motor Vehicles, supra,* 11 Cal.3d 146, 154-155); whether the claimant is required to post a bond which theoretically would deter frivolous claims; the importance of the interest taken; whether the taking is necessary to "secure an important governmental or general public interest"; whether there is a need for very prompt action; whether a governmental official or private individual may make the decision to invoke the "taking" (*Fuentes v. Shevin, supra,* 407 U.S. at pp. 83-93; see also *Randone v. Appellate Department, supra,* 5 Cal.3d 536, 553-554); the length of the deprivation (*Fuentes v. Shevin, supra; Adams v. Department of Motor Vehicles, supra*); the nature of the creditor's interest in the property, if any; whether the debtor can immediately seek dissolution of the action which constitutes the taking; and whether the alleged debtor could effectively dispose of the property in the absence of the prejudgment remedy. (*Mitchell v. W. T. Grant Co.* (1974) ..... U.S. ..... [94 S.Ct. 1895, 1900-1901].)

Of particular significance to the constitutionality of the Mechanics' Lien law are such factors as the increase in the value of the property as the result of the mechanic or materialman contributing labor or materials to the improvement thereon, the minimal impingement of the lien upon the owner's possession and continued use of the property, and the public interest in maintaining the balance in the traditionally unstable construction industry.

With respect to the significance of the property interest infringed upon when the lien is imposed, it is readily apparent that the owner is not deprived of the possession of his property in any way; nor is he, as petitioner contends, deprived of the use of his property. (Cf. *Blair v. Pitchess, supra,* 5 Cal.3d 258, 278.) In *Randone v. Appellate Department, supra,* 5 Cal.3d 536, 544-545, fn. 4, the court observed:

> "Because the attachment of real estate does not generally deprive an owner of the use of his property, but merely constitutes a lien on the property, the 'taking' generated by such attachment is frequently less severe than that arising from other attachments. In view of this basic difference in the effect of such attachment, it has been suggested that a statute which dealt solely with the attachment of real estate might possibly [197] involve constitutional considerations of a different magnitude than those discussed hereafter.
>
> "See generally Note, *Attachment in California: A New Look at an Old Writ* (1970) (22 Stan. L. Rev. 1254, 1277-1279.) The instant statute is not so limited, however, and the great majority of cases arising under it do involve the deprivation of an owner's use of his property; thus we have no occasion in this proceeding to speculate as to the constitutionality of a prejudgment attachment provision which does not significantly impair such use."

Similarly, in *Empfield v. Superior Court* (1973) 33 Cal. App.3d 105, the court rejected a challenge to the constitutionality of a prejudgment lis pendens, stating:

> "The notice of lis pendens does not deprive petitioners of 'necessities of life' or *any significant property interest*. They may still use the property and enjoy the profits from it. [Citation.] Concededly, the marketability of the property may be impaired to some degree, but the countervailing interest of the state in an orderly recording and notice system for transactions in real property makes imperative notice to buyers of property of the pending cause of action concerning that property. [Citations.]" (33 Cal.App.3d 105, 108; emphasis added.)

This motion has been applied in at least two cases upholding the constitutionality of mechanic's lien laws.[3] In *Cook v. Carlson* (D. S.D. 1973) 364 F.Supp. 24, 27, the court observed:

> "The mechanics' and materialman's lien, however, neither deprives the owner of the possession nor of the use of his property. Although the use of the property might be said to be curtailed, in that selling the property, borrowing on the property, or renting the property may be more difficult or less profitable, the owner is not legally prevented from selling, encumbering, renting or otherwise dealing with his property as he chooses. Although the value of the property may be diminished due to the existence of the lien, two factors tend to mitigate that harm: (1) while the value of the property may be diminished by the amount of the lien, the improvements, at least theoretically, have increased the value of the property by the amount of the lien, thereby minimizing harm to the owner; and, (2) the owner can force an expeditious adjudication on the merits, without cost to him, by demanding that the lien be foreclosed, whereupon the lienholder must commence foreclosure proceedings within [90 days] or forfeit the lien. [Citation.]"

3. It is also noted that at least one federal court has struck down a "mechanic's lien law" (see *Mason v. Garris* (N.D. Ga. 1973) 360 F.Supp. 420). There, however, the challenged statute was in effect a "garageman's lien," and the court only held that the summary foreclosure of the lien without a prior hearing was constitutionally infirm. Accordingly, that decision did no more than what was done by our Supreme Court in *Adams v. Department of Motor Vehicles, supra.*

(See also *Spielman-Fond, Inc. v. Hanson's Inc.* (D. Ariz. 1973) ..... F.Supp. .....*.)[4]

With respect to the relative interests in the property, the recent case of *Adams v. Department of Motor Vehicles, supra*, 11 Cal.3d 146, indicates that one who performs labor on and contributes material to property has a "possessory interest" therein until compensation for the labor and materials is forthcoming. In upholding the constitutionality [198] retention provisions of the garageman's lien, the court observed:

> "In none of the cases bearing on temporary deprivation of use and enjoyment of property did the creditor have a possessory interest of the same character as a garageman's interest in a car left for him to repair with his own labor and materials. Usually the claim of an attaching or garnisheeing creditor is a general claim unrelated to the specific property seized. And while the claim of a conditional vendor or chattel mort-

*No. Civ. 72-417 Phx WEC, filed September 12, 1973, subsequently ordered published June 1974.

4. In *Gunter v. Merchants Warren National Bank* (D.Maine 1973) 360 F.Supp. 1085, it was held that prejudgment attachment of real estate violated due process. That case was distinguished in *Cook v. Carlson, supra*, however, where the court observed that prejudgment attachment under the challenged statute absolutely prevented the owner from transferring or further encumbering the property. (*Cook v. Carlson, supra*, 364 F.Supp. 24, 27.)

> gagee arises out of a transaction involving the seized chattel itself, the interest of such creditor in the seized chattel is ordinarily purely pecuniary; the creditor has not, subsequent to the acquisition of the chattel by the vendee or mortgagee, *mixed his own labor with it, nor, more significantly has he added to it materials to which he originally had a right or possession.*" (Fn. omitted; emphasis added; 11 Cal.3d at pp. 154-155.)

Furthermore, the public interest in maintaining the stability of the construction industry is a factor of some significance. In *Cook v. Carlson, supra,* 364 F.Supp. 24, 29, the court observed:

> "The mechanics' and materialmen's lien originated in the necessity of protecting the construction industry and those in its employ. Labor and materials contractors are in a particularly vulnerable position. Their credit risks are not as diffused as those of other creditors. They extend a bigger block of credit, they have more riding on one transaction, and they have more people vitally dependent upon eventual payment. They have much more to lose in the event of default.
>
> There must be some procedure for the interim protection of contractors in this situation. A contractor must have some protection against subsequent bona fide purchasers between the time he completes the work and the time he gets a judgment. Considering their vulnerability, and especially considering their importance to the stability of the American economy, I think there exists sufficient justification for the South Dakota statutory scheme which creates a lien as a matter of law as soon as labor and materials are furnished."

We conclude that since the mechanics' lien provisions impose a minor encumbrance on the property in favor of persons who presumably have added materials or labor to the value of the property, that since it does not interfere

with the possession or use of the property by the debtor, protects the mechanics' and materialmen's interest in the property, and is necessitated by the importance of the construction industry to the economy, the provisions of the mechanics' lien statute providing for the imposition of a lien upon the work of improvement and real property upon which it is located prior to a hearing are not unconstitutional.[5]

STOP NOTICE

The challenge to the constitutionality of the bonded stop notice (§§ 3156-3172) poses a significantly more serious question than does the mechanics' lien.

Upon receipt of the bonded stop notice the construction lender must set aside the funds for payment to the claimant (§ 3162). The stop notice constitutes an "equitable garnishment" on the balance of the loan funds in the amount stated in the notice (*Calhoun v. Huntington Park First Sav. & Loan Assn.* (1960) 186 Cal.App.2d 451, 459) and in effect mandates the withholding of the funds in the amount stated from the owner and general contractor to whom the funds belong. (*Systems Inv. Corp. v. National* [199] *Auto & Cas. Ins. Co.* (1972) 25 Cal.App.3d 1057, 1061.)
now is the time for all good men to come to the aid of theor

Furthermore, despite any contractual rights the construction lender may have by his contract with the owner, he cannot apply the garnished funds to the payment of amounts due to the lender himself. Even though the loan

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5. Petitioners' contention that the Mechanics' Lien Law denies equal protection of the law (*Hollenbeck-Bush P. Mill Co. v. Amweg* (1917) 177 Cal. 159, 165) and amici curiae's argument that petitioners waived their constitutional rights to due process of law by contracting "with the law before them" are without merit. (*Fuentes v. Shevin, supra,* 407 U.S. 67, 94-96.)

is in default and the lender is otherwise entitled to use the funds remaining in the construction loan account to cure the default or reduce the debt, the fund becomes frozen when a bonded stop notice is received and the lender in effect cannot use his own funds to satisfy his own debt. (§ 3166; *Idaco Lumber Co. v. Northwestern S. & L. Assn.* (1968) 265 Cal.App.2d 490, 496-497; *Rossman Mill & Lbr. Co. v. Fullerton S. & L. Assn.* (1963) 221 Cal.App.2d 705, 709-710.)

The claimant's priority is over all other persons who claim an interest in the funds. A lender cannot apply the funds to complete the construction (*H. O. Bragg Roofing, Inc. v. First Federal Sav. & Loan Assn.* (1964) 226 Cal. App.2d 24, 27-28) and, except for actual possession, the rights of the stop notice claimant to the garnished funds are complete.

Thus the procedure clearly calls for a summary prejudgment "taking" by the claimant of the construction loan funds without a hearing though the claimant has no interest in the funds save the possibility that he might eventually recover judgment. This possibility is immaterial, however, for as the Supreme Court observed in *Fuentes v. Shevin, supra*, "'To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits.'" (407 U.S. at p. 87.) It is precisely this fact, that is, the taking before the validity of the claim is determined, that violates due process.[6]

6. Diamond urges that it had an interest in the construction fund from the beginning in that the fund was established for the purpose of paying the claims of persons furnishing labor and materials for the project and amounts to a trust fund for that purpose. However, the enactment of section 3264 abolished any theory of equitable lien or trust fund. It states: "The rights of all persons furnishing labor, services, equipment, or materials for any work of improvement, with respect to any fund for payment of construction costs, are governed exclusively by Chapters 3 (commencing with Section 3156) and 4 (commencing with Section 3179) of this title, and no person may assert any legal or equitable right with respect to such fund, other than a right created by direct written contract between such person and the person holding the fund, except pursuant to the provisions of such chapters."

Unlike the mechanic's lien, the claimant does not contribute to or improve or increase the fund by labor or material and interference with the use of the "fund" is total. Moreover, merely because the claimant has posted a bond to protect the debtor against damages from wrongful seizure is not sufficient to justify a summary taking of his property. (*Fuentes v. Shevin, supra,* 407 U.S. at pp. 79-80.)

In *Sniadach* it was clear that the property right taken by the wage garnishment was the use of the garnished wages (*Sniadach v. Family Finance Corp., supra,* 395 U.S. at p. 342 (Harlan, J., concurring); see also *Randone v. Appellate Department, supra,* 5 Cal.3d 536, 548, fn. 9; *Blair v. Pitchess, supra,* 5 Cal.3d at pp. 277-278), just as the owner, contractor and construction lender are, upon the filing of the stop notice, totally deprived of the *use* of construction funds in the amount claimed. In the normal course of events, the owner or contractor will be deprived of the use of these funds without a hearing for a period up to two years.

Sniadach, Randone and other cases additionally refer to the hardship that results when wages and bank accounts are garnished. Similar hardships can be suffered by the owner, contractor and/or lender when the loan funds are garnished. (See Miller, *Validity of the Stop Notice as a* [200] *Summary Remedy* (1973) 48 State Bar J. 44, 106-107; Ilyin, *Stop Notice!—Construction Loan Officers' Night-*

mare (1964) 16 Hastings L.J. 187; Comment, *California's Private Stop Notice Law: Due Process Requirements* (1974) 25 Hastings L.J. 1043.) The contractor, for instance, depends upon the construction funds for payment of his costs of construction. Deprival of these funds usually results in an inability to pay necessary expenses and employees and the consequent incurrence of additional costs. Similarly, as a result of the prehearing garnishment of the funds, the owner may be in default under the terms of his loan and may be unable to complete the improvement, causing the loss of his property by foreclosure pending a hearing on the merits of the claim. As to the lender, he relies upon the funds to assure the construction project is completed and the costs of construction are paid, it being a usual and customary provision in construction loan agreements that upon default by the borrower the lender may use the construction fund to complete the improvement in order that it may have the full and bargained-for security for its loan. This is an important property right in the loan funds of which the lender is deprived upon garnishment.

While the same public policy in favor of mechanics and materialmen referred to in our discussion of the Mechanics' Lien Law is applicable, inasmuch as the less ruthless remedy of mechanics' lien is available to claimants the public interest in the "cumulative" remedy of a stop notice (*Idaco Lumber Co. v. Northwestern S. & L. Assn., supra,* 265 Cal.App.2d 490, 498) is muted.

We have thus arrived at the inescapable conclusion that Diamond's bonded stop notice was invalid because the

statutory base upon which it rests offends fundamental principles of procedural due process.[7]

Let a writ of prohibition issue prohibiting the Superior Court of Merced County from proceeding further upon the second cause of action of the complaint except to dismiss said cause of action. The order to show cause is otherwise discharged.

/s/ Brown, (Geo. A.), P.J.

We concur:

/s/ Gargano, J.

/s/ Franson, J.

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7. It is noted that there are summary procedures which provide for a quick adjudication of the validity of the creditor's claim when a stop notice is imposed in connection with a "public work." (See §§ 3197-3205.) While these summary procedures would probably satisfy due process (*Mitchell v. W. T. Grant Co., supra,* ..... U.S. ..... [94 S.Ct. 1895]), for reasons not clear their provisions are expressly made inapplicable to stop notices on private work (§ 3179). (See generally, Comment, *California's Private Stop Notice Law: Due Process Requirements* (1974) 25 Hastings L.J. 1043, 1047, 1072-1073.)

Appendix C

CALIFORNIA CIVIL CODE

Title 15

WORKS OF IMPROVEMENT

Chapter 1

GENERAL DEFINITIONS

§ 3082. Construction

Unless the context otherwise requires, the provisions in this chapter govern the construction of this title.

§ 3083. Bonded stop notice

"Bonded stop notice" means a stop notice, given to any construction lender, accompanied by a bond with good and sufficient sureties in a penal sum equal to 1¼ times the amount of such claim conditioned that if the defendant recovers judgment in an action brought on such verified claim or on the lien filed by the claimant, the claimant will pay all costs that may be awarded against the owner, original contractor, construction lender, or any of them, and all damages that such owner, original contractor, or construction lender may sustain by reason of the equitable garnishment effected by the claim or by reason of the lien, not exceeding the sum specified in the bond. To be effective such bonded stop notice shall be delivered to the manager or other responsible officer or person at the office of the

construction lender or must be sent to such office by registered or certified mail. If such notice is delivered or sent to any institution or organization maintaining branch offices, it shall not be effective unless delivered or sent to the office or branch administering or holding such construction funds.

§ 3084. Claim of lien; contents

"Claim of lien" means a written statement, signed and verified by the claimant or by his agent, containing all of the following:

(a) A statement of his demand after deducting all just credits and offsets.

(b) The name of the owner or reputed owner, if known.

(c) A general statement of the kind of labor, services, equipment, or materials furnished by him.

(d) The name of the person by whom he was employed or to whom he furnished the labor, services, equipment, or materials.

(e) A description of the site sufficient for identification.

§ 3085. Claimant

"Claimant" means any person entitled under this title to record a claim of lien, to give a stop notice in connection with any work of improvement, or to recover on any payment bond, or any combination of the foregoing.

§ 3086. Completion; equivalents

"Completion" means, in the case of any work of improvement other than a public work, actual completion of the work of improvement. Any of the following shall be deemed equivalent to a completion:

(a) The occupation or use of a work of improvement by the owner, or his agent, accompanied by cessation of labor thereon.

(b) The acceptance by the owner, or his agent, of the work of improvement.

(c) After the commencement of a work of improvement, a cessation of labor thereon for a continuous period of 60 days, or a cessation of labor thereon for a continuous period of 30 days or more if the owner files for record a notice of cessation.

If the work of improvement is subject to acceptance by any public entity, the completion of such work of improvement shall be deemed to be the date of such acceptance; provided, however, that, except as to contracts awarded under the State Contract Act, Chapter 3 (commencing with Section 14250), Part 5, Division 3, Title 2 of the Government Code, a cessation of labor on any public work for a continuous period of 30 days shall be a completion thereof.

§ 3087. Construction lender

"Construction lender" means any mortgagee or beneficiary under a deed of trust lending funds with which the cost of the work of improvement is, wholly or in part, to be defrayed, or any assignee or successor in interest of either, or any escrow holder or other party holding any funds furnished or to be furnished by the owner or lender or any other person as a fund from which to pay construction costs.

§ 3088. Contract

"Contract" means an agreement between an owner and any original contractor providing for the work of improvement or any part thereof.

§ 3089. Laborer

"Laborer" means any person who, acting as an employee,

performs labor upon or bestows skill or other necessary services on any work of improvement.

§ 3090. Materialman

"Materialman" means any person who furnishes materials or supplies to be used or consumed in any work of improvement.

§ 3091. Ninety-day public works preliminary bond notice; persons authorized to give

"Ninety-day public works preliminary bond notice" means a notice which must be given by any claimant other than one of the following:

(a) A claimant who performs actual labor for wages or an express trust fund as described in Section 3111.

(b) A claimant who has a direct contractual relationship with the original contractor.

The notice is required only on public works, and is a necessary prerequisite to enforcement of a claim on a payment bond. The notice shall be in writing and shall state with substantial accuracy the amount claimed, and the name of the party to whom the claimant furnished labor, services, equipment, or materials. The notice shall be given within 90 days from the date on which the claimant furnished the last labor, services, equipment, or materials for which such claim is made.

The notice shall be served by mailing the same by registered or certified mail, postage prepaid, in an envelope addressed to the original contractor at any place he maintains an office, or conducts his business, or his residence, or by personal service.

§ 3092. Notice of cessation; contents

"Notice of cessation" means a written notice, signed and

verified by the owner or his agent, containing all of the following:

(a) The date on or about when the cessation of labor commenced.

(b) A statement that such cessation has continued until the recording of the notice of cessation.

(c) The name and address of the owner.

(d) The nature of the interest or estate of the owner.

(e) A description of the site sufficient for identification, containing the street address of the site, if any. If a sufficient legal description of the site is given, the validity of the notice shall not, however, be affected by the fact that the street address is erroneous or is omitted.

(f) The name of the original contractor, if any, for the work of improvement as a whole.

(g) For the purpose of this section, "owner" means the owner who causes a building, improvement, or structure, to be constructed, altered, or repaired (or his successor in interest at the date of a notice of cessation from labor is filed for record) whether the interest or estate of such owner be in fee, as vendee under a contract of purchase, as lessee, or other interest or estate less than the fee. Where such interest or estate is held by two or more persons as joint tenants or tenants in common, any one or more of the cotenants may be deemed to be the "owner" within the meaning of this section. Any notice of cessation signed by less than all of such cotenants shall recite the names and addresses of all such cotenants.

The notice of cessation shall be recorded in the office of the county recorder of the county in which the site is located and shall be effective only if there has been a continuous cessation of labor at least 30 days prior to such recording.

§ 3093. Notice of completion; contents

"Notice of completion" means a written notice, signed and verified by the owner or his agent, containing all of the following:

(a) The date of completion (other than a cessation of labor). The recital of an erroneous date of completion shall not, however, affect the validity of the notice if the true date of completion is within 10 days preceding the date of recording of such notice.

(b) The name and address of the owner.

(c) The nature of the interest or estate of the owner.

(d) A description of the site sufficient for identification, containing the street address of the site, if any. If a sufficient legal description of the site is given, the validity of the notice shall not, however, be affected by the fact that the street address recited is erroneous or that such street address is omitted.

(e) The name of the original contractor, if any, or if the notice is given only of completion of a contract for a particular portion of such work of improvement, as provided in Section 3117, then the name of the original contractor under such contract, and a general statement of the kind of work done or materials furnished pursuant to such contract.

The notice of completion shall be recorded in the office of the county recorder of the county in which the site is located, within 10 days after such completion.

If there is more than one owner, any notice of completion signed by less than all of such co-owners shall recite the names and addresses of all of such co-owners; and provided further, that any notice of completion signed by a successor in interest shall recite the names and addresses of his transferor or transferors.

For the purpose of this section, owner is defined as set forth in subdivision (g) of Section 3092.

§ 3094. Notice of nonresponsibility; contents

"Notice of nonresponsibility" means a written notice, signed and verified by a person owning or claiming an interest in the site who has not caused the work of improvement to be performed, or his agent, containing all of the following:

(a) A description of the site sufficient for identification.

(b) The name and nature of the title or interest of the person giving the notice.

(c) The name of the purchaser under contract, if any, or lessee, if known.

(d) A statement that the person giving the notice will not be responsible for any claims arising from the work of improvement.

Within 10 days after the person claiming the benefits of nonresponsibility has obtained knowledge of the work of improvement, the notice provided for in this section shall be posted in some conspicuous place on the site. Within the same 10-day period provided for the posting of the notice, the notice shall be recorded in the office of the county recorder of the county in which the site or some part thereof is located.

§ 3095. Original contractor

"Original contractor" means any contractor who has a direct contractual relationship with the owner.

§ 3096. Payment bond

"Payment bond" means a bond with good and sufficient sureties which is conditioned for the payment in full of the claims of all claimants and which also by its terms is made to inure to the benefit of all claimants so as to give such

persons a right of action to recover upon such bond in any suit brought to foreclose the liens provided for in this title or in a separate suit brought on such bond. Either an owner or an original contractor may be the principal upon any payment bond.

§ 3097. Preliminary 20-day notice (private work)

"Preliminary 20-day notice (private work)" means a written notice from a claimant that is given prior to the recording of a mechanic's lien and prior to the filing of a stop notice, and is required to be given under the following circumstances:

(a) Written preliminary notice; parties

(a) Except one under direct contract with the owner or one performing actual labor for wages, or an express trust fund described in Section 3111, every person who furnishes labor, service, equipment, or material for which a lien otherwise can be claimed under this title, or for which a notice to withhold can otherwise be given under this title, must, as a necessary prerequisite to the validity of any claim of lien, and of a notice to withhold, cause to be given to the owner or reputed owner, to the original contractor, or reputed contractor, and to the construction lender, if any, or to the reputed construction lender, if any, a written preliminary notice as prescribed by this section.

(b) Construction lender

(b) Except the contractor, or one performing actual labor for wages, or an express trust fund described in Section 3111, all persons who have a direct contract with the owner and who furnish labor, service, equipment, or material for which a lien otherwise can be claimed under this title, or for which a notice to withhold can otherwise be given under this title, must, as a necessary prerequisite

to the validity of any claim of lien, and of a notice to withhold, cause to be given to the construction lender, if any, or to the reputed construction lender, if any, a written preliminary notice as prescribed by this section.

(c) Time; content; architect, engineer or surveyor

(c) The preliminary notice referred to in subdivisions (a) and (b) shall be given not later than 20 days after the claimant has first furnished labor, service, equipment, or materials to the jobsite, and shall contain the following information:

(1) A general description of the labor, service, equipment, or materials furnished, or to be furnished, and if there is a construction lender, he shall be furnished with an estimate of the total price thereof in addition to the foregoing.

(2) The name and address of such person furnishing such labor, service, equipment, or materials.

(3) The name of the person who contracted for purchase of such labor, service, equipment, or materials.

(4) A description of the jobsite sufficient for identification.

(5) A statement that if bills are not paid in full for labor, service, equipment, or material furnished, or to be furnished, the improved property may be subject to mechanic's liens.

(6) If such notice is given by a subcontractor who is required pursuant to a collective bargaining agreement to pay supplemental fringe benefits into an express trust fund described in Section 3111, such notice shall also contain the identity and address of such trust fund or funds.

If an invoice for such materials contains the information required by this section, a copy of such invoice, transmitted in the manner prescribed by this section shall be sufficient notice.

A certificated architect, registered engineer, or licensed land surveyor who has furnished services for the design of the work of improvement and who gives a preliminary notice as provided in this section not later than 20 days after the work of improvement has commenced shall be deemed to have complied with subdivisions (a) and (b) with respect to architectural, engineering, or surveying services furnished, or to be furnished.

(d) Election not to give preliminary notice; subsequent rights

(d) If labor, service, equipment, or materials have been furnished to a jobsite by a person who elected not to give a preliminary notice as provided in subdivision (a) or (b), such person shall not be precluded from giving a preliminary notice not later than 20 days after furnishing other labor, service, equipment, or materials to the same jobsite. Such person shall, however, be entitled to claim a lien and a notice to withhold only for such labor, service, equipment, or material furnished within 20 days prior to the service of such notice, and at any time thereafter.

(e) Waiver

(e) Any agreement made or entered into by an owner, whereby the owner agrees to waive the rights or privileges conferred upon him by this section shall be void and of no effect.

(f) Service

(f) The notice required under this section may be served as follows:

(1) If the person to be notified resides in this state, by delivering the notice personally, or by leaving it at his address of residence or place of business with some person in charge, or by first-class registered or certified mail, postage prepaid, addressed to the person to whom notice

is to be given at his residence or place of business address or at the address shown by the building permit on file with the authority issuing a building permit for the work, or at an address recorded pursuant to subdivision (j) of this section.

(2) If the person to be notified does not reside in this state, by any method enumerated in paragraph (1) of this subdivision. If such person cannot be served by any of such methods, then notice may be given by first-class certified or registered mail, addressed to the construction lender or to the original contractor.

(3) When service is made by first-class certified or registered mail, service is complete at the time of the deposit of such registered or certified mail.

(g) Single notice; additional material, service or labor

(g) A person required by this section to give notice to the owner and to an original contractor, and to a person to whom a notice to withhold may be given, need give only one such notice to the owner, and to the original contractor and to the person to whom a notice to withhold may be given with respect to all materials, service, labor, or equipment he furnishes for a work of improvement, which means the entire structure or scheme of improvements as a whole, unless the same is furnished under contracts with more than one subcontractor, in which event, the notice requirements must be met with respect to materials, services, labor, or equipment furnished to each such contractor.

If a notice contains a general description required by subdivision (a) or (b) of the materials, services, labor, or equipment furnished to the date of notice, it is not defective because, after such date, the person giving notice furnishes materials, services, labor, or equipment not within the scope of such general description.

(h) Disciplinary action against contractors and subcontractors

(h) Where the contract price to be paid to any subcontractor on a particular work of improvement exceeds four hundred dollars ($400), the failure of that contractor, licensed under Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, to give the notice provided for in this section, constitutes grounds for disciplinary action by the Registrar of Contractors.

Where such notice is required to contain the information set forth in paragraph (6) of subdivision (c), a failure to give such notice, including such information, that results in the filing of a lien or the delivery of a stop notice by the express trust fund to which such obligation is owing constitutes grounds for disciplinary action by the Registrar of Contractors against the subcontractor if the amount due such trust fund is not paid.

(i) Construction lender; designation or permit application

(i) Every city, county, city and county, or other governmental authority issuing building permits shall, in its application form for a building permit, provide space and a designation for the applicant to enter the name, branch designation, if any, and address of the construction lender and shall keep the information on file open for public inspection during the regular business hours of the authority.

If there is no known construction lender, that fact shall be noted in such designated space. Any failure to indicate the name and address of the construction lender on such application, however, shall not relieve any person from the obligation to give to the construction lender the notice required by this section.

(j) Designation of mortgage, deed of trust or other instrument securing loan

(j) A mortgage, deed of trust, or other instrument securing a loan, any of the proceeds of which may be used for the purpose of constructing improvements on real property, shall bear the designation "Construction Trust Deed" prominently on its face and shall state all of the following: (1) the name and address of the lender, and the name and address of the owner of the real property decribed in the instrument, and (2) a legal description of the real property which secures the loan and, if known, the street address of the property. The failure to be so designated or to state any of the information required by this subdivision shall not affect the validity of any such mortgage, deed of trust, or other instrument.

Failure to provide such information on such an instrument when recorded shall not relieve persons required to give preliminary notice under this section from such duty.

The county recorder of the county in which such instrument is recorded shall indicate in the general index of the official records of the county that such instrument secures a construction loan.

(k) Trust fund and lender; supplementary fringe benefits

(k) Every contractor and subcontractor who is required pursuant to a collective bargaining agreement to pay supplementary fringe benefits into an express trust fund described in Section 3111, and who has failed to do so shall cause to be given to such fund and to the construction lender, if any, or to the reputed construction lender, if any, not later than five days following the date such payment was due to such fund, a written notice containing:

(1) The name of the owner and the contractor.

(2) A description of the jobsite sufficient for identification.

(3) The identity and address of the express trust fund.

(4) The total number of straight-time and overtime hours on each such job, payment for which the contractor or subcontractor is delinquent to the express trust.

(5) The amount then past due and owing.

Failure to give such notice shall constitute grounds for disciplinary action by the Registrar of Contractors.

(*l*) Contract; name and address of owner; copy for inspection.

(*l*) Every written contract entered into between a property owner and an original contractor shall provide space for the owner to enter his name and address of residence; and place of business if any. The original contractor shall make available a copy of such contract for inspection by any person seeking to serve notice required by this section.

§ 3097.1 Proof of service of preliminary 20-day notice; receipt; affidavit

Proof that the preliminary 20-day notice required by Section 3097 was served in accordance with subdivision (f) of Section 3097 shall be made as follows:

(a) If served by personally delivering the notice to the person to be notified, or by leaving it at his address or place of business with some person in charge, or if served by mail, by an acknowledgment of receipt of the notice in a form substantially as follows:

.....

Signature of sender

ACKNOWLEDGMENT OF RECEIPT OF PRELIMINARY 20-DAY NOTICE

This acknowledges receipt on (insert date) of a copy of the preliminary 20-day notice at (insert address).

Date: .....

(Date this acknowledgment is executed)

.....

Signature of person acknowledging receipt, with title if acknowledgment is made on behalf of another person

(b) If a person to whom the notice is served pursuant to subdivision (f) of Section 3097 fails to complete the acknowledgment or fails to complete and return the acknowledgment within 30 days from the date of mailing, proof of service may be made by affidavit of the person making such service, showing the time, place and manner of service and facts showing that such service was made in accordance with Section 3097. Such affidavit shall show the name and address of the person to whom a copy of the preliminary 20-day notice was delivered, and, if appropriate, the title or capacity in which he was served. If service was made by mail, the receipt of certification or registration shall be attached to the affidavit.

§ 3098. Preliminary 20-day notice (public work), stop notice; service; disciplinary action; exemption for express trust fund

"Preliminary 20-day notice (public work), stop notice" means a written notice from a claimant that was given

prior to the filing of a stop notice on public work, and is required to be given under the following circumstances:

(a) In any case in which the law of this state affords a right to a person furnishing labor or materials for a public work who has not been paid therefor to file a stop notice with the public agency concerned, and thereby cause the withholding of payment from the contractor for the public work, any such person having no direct contractual relationship with the contractor, other than a person who performed actual labor for wages or an express trust fund described in Section 3111, may file such a notice, but no payment shall be withheld from any such contractor, pursuant to any such notice, unless such person has caused written notice to be given to such contractor, and the public agancy concerned, not later than 20 days after the claimant has first furnished labor, services, equipment, or materials to the jobsite, stating with substantial accuracy a general description of labor, service, equipment, or materials furnished or to be furnished, and the name of the party to whom the same was furnished. Such notice shall be served by mailing the same by first-class mail, registered mail, or certified mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or by personal service. In case of any public works constructed by the Department of Public Works or the Department of General Services of the state, such notice shall be served by mailing in the same manner as above, addressed to the office of the disbursing officer of the department constructing the work, or by personal service upon such officer. When service is by registered or certified mail, service is complete at the time of the deposit of the registered or certified mail.

(b) Where the contract price to be paid to any subcontractor on a particular work of improvement exceeds four hundred dollars ($400), the failure of that contractor, licensed under Chapter 9, (commencing with Section 7000) of Division 3 of the Business and Professions Code, to give the notice provided for in this section, constitutes grounds for disciplinary action by the Registrar of Contractors.

(c) The notice requirements of this section shall not apply to an express trust fund described in Section 3111.

§ 3099. Public entity

"Public entity" means the state, Regents of the University of California, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the state.

§ 3100. Public work

"Public work" means any work of improvement contracted for by a public entity.

§ 3101. Site

"Site" means the real property upon which the work of improvement is being constructed or performed.

§ 3102. Site improvement

"Site improvement" means the demolishing or removing of improvements, trees, or other vegetation located thereon, or drilling test holes or the grading, filling, or otherwise improving of any lot or tract of land or the street, highway, or sidewalk in front of or adjoining any lot or tract of land, or constructing or installing sewers or other public utilities therein, or constructing any areas, vaults, cellars, or rooms under said sidewalks or making any improvements thereon.

§ 3103. Stop notice; contents; service

"Stop notice" means a written notice, signed and verified by the claimant or his agent, stating in general terms all of the following:

(a) The kind of labor, services, equipment, or materials furnished or agreed to be furnished by such claimant.

(b) The name of the person to or for whom the same was done or furnished.

(c) The amount in value, as near as may be, of that already done or furnished and of the whole agreed to be done or furnished.

Such notice, in the case of any work of improvement other than a public work, shall be delivered to the owner personally or left at his residence or place of business with some person in charge, or delivered to his architect, if any, and, if the notice is served upon a construction lender, holding construction funds and maintaining branch offices, it shall not be effective as against such construction lender unless given to or served upon the manager or other responsible officer or person at the office or branch thereof administering or holding the construction funds. Such notice, in the case of any public work for the state, shall be filed with the director of the department which let the contract and, in the case of any other public work, shall be filed in the office of the controller, auditor, or other public disbursing officer whose duty it is to make payments under the provisions of the contract, or with the commissioners, managers, trustees, officers, board of supervisors, board of trustees, common council, or other body by whom the contract was awarded. No such notice shall be invalid by reason of any defect in form if it is sufficient to substantially inform the owner of the information required.

Any stop notice may be served by registered or certified mail with the same effect as by personal service.

§ 3104. Subcontractor

"Subcontractor" means any contractor who has no direct contractual relationship with the owner.

§ 3105. Subdivision

"Subdivision" means a work of improvement consisting of two or more separate residential units or two or more buildings, mining claims, or other improvements owned or reputed to be owned by the same person or on which the claimant has been employed by the same person. A separate residential unit means one residential structure, together with any garage or other improvements appurtenant thereto.

§ 3106. Work of improvement

"Work of improvement" includes but is not restricted to the construction, alteration, addition to, or repair, in whole or in part, of any building, wharf, bridge, ditch, flume, aqueduct, well, tunnel, fence, machinery, railroad, or road, the seeding, sodding, or planting of any lot or tract of land for landscaping purposes, the filling, leveling, or grading of any lot or tract of land, the demolition of buildings, and the removal of buildings. Except as otherwise provided in this title, "work of improvement" means the entire structure or scheme of improvement as a whole.

Chapter 2

MECHANICS' LIENS

Sec.

Article 1

APPLICATION OF CHAPTER

§ 3109. Application

This chapter does not apply to any public work.

Article 2

WHO IS ENTITLED TO LIEN

Sec.

§ 3110. Persons entitled to lien; agent of owner

Mechanics, materialmen, contractors, subcontractors, lessors of equipment, artisans, architects, registered engineers, licensed land surveyors, machinists, builders, teamsters, and draymen, and all persons and laborers of every class performing labor upon or bestowing skill or other necessary services on, or furnishing materials or leasing equipment to be used or consumed in or furnishing appliances, teams, or power contributing to a work of improvement shall have a lien upon the property upon which they have bestowed labor or furnished materials or appliances or leased equipment for the value of such labor done or materials furnished and for the value of the use of such

appliances, equipment, teams, or power whether done or furnished at the instance of the owner or of any person acting by his authority or under him as contractor or otherwise. For the purposes of this chapter, every contractor, subcontractor, sub-subcontractor, architect, builder, or other person having charge of a work of improvement or portion thereof shall be held to be the agent of the owner.

§ 3111. Trust fund lien under labor agreement

For the purposes of this chapter, an express trust fund established pursuant to a collective bargaining agreement to which payments are required to be made on account of fringe benefits supplemental to a wage agreement for the benefit of a claimant on particular real property shall have a lien on such property in the amount of the supplemental fringe benefit payments owing to it pursuant to the collective bargaining agreement.

§ 3111.5 Statement of Trust Fund to Subcontractor—Required Information.

(a) Every trust fund as described in Section 3111 shall, upon written demand by a subcontractor, give to the subcontractor in person, or by first-class mail, addressed to the address of the subcontractor as stated on the demand, within five working days of the receipt of the demand, a written statement which shall contain the following information:

(1) The name and address of the subcontractor.

(2) A list of those months in the 12 months preceding the demand, commencing with the last month of record in possession of the trust fund, for which the subcontractor has paid supplemental fringe benefit payments.

(3) The facts, if such be the case, that the trust fund has no information or belief that the subcon-

tractor is further indebted to the trust fund for those months.

(b) The statement of the trust fund provided for in subdivision (a) above shall be, without prejudice to the trust fund, sufficient to satisfy any creditors of the subcontractor to whom it is given that the subcontractor is not indebted to the trust fund for the months so stated, without further release from the trust fund.

§ 3112. Claimant making site improvement

Any claimant who, at the instance or request of the owner (or any other person acting by his authority or under him, as contractor or otherwise) of any lot or tract of land, has made any site improvement has a lien upon such lot or tract of land for work done or materials furnished.

Article 3

CONDITIONS TO ENFORCING A LIEN

Sec.

§ 3114. Preliminary 20-day notice; necessity; proof

A claimant shall be entitled to enforce a lien only if he has given the preliminary 20-day notice (private work) in accordance with the provisions of Section 3097, if required by that section, and has made proof of service in accordance with the provisions of Section 3097.1.

§ 3115. Original contractor; recordation of claim; time

Each original contractor, in order to enforce a lien, must record his claim of lien after he completes his contract and before the expiration of (a) 90 days after the completion of the work of improvement as defined in Section 3106 if no notice of completion or notice of cessation has been recorded, or (b) 60 days after recordation of a notice of completion or notice of cessation.

§ 3116. Other claimants; recordation of claim; time

Each claimant other than an original contractor, in order to enforce a lien, must record his claim of lien after he has ceased furnishing labor, services, equipment, or materials, and before the expiration of (a) 90 days after completion of the work of improvement if no notice of completion or cessation has been recorded, or (b) 30 days after recordation of a notice of completion or notice of cessation.

§ 3117. Notice of completion by owner; recordation by claimant; time

Where the work of improvement is not made pursuant to one original contract for the work of improvement but is made in whole or in part pursuant to two or more original contracts, each covering a particular portion of the work of improvement, the owner may, within 10 days after completion of any such contract for a particular portion of the work of improvement, record a notice of completion. If such notice of completion be recorded, notwithstanding the provisions of Sections 3115 and 3116, the original contractor under the contract covered by such notice must, within 60 days after recording of such notice, and any claimant under such contract other than the original contractor must, within 30 days after the recording of such notice of completion, record his claim of lien. If such notice

is not recorded, then the period for recording claims of lien shall be as provided for in Sections 3115 and 3116.

§ 3118. Forfeiture of lien

Any person who shall willfully include in his claim of lien labor, services, equipment, or materials not furnished for the property described in such claim shall thereby forfeit his lien.

Article 4

AMOUNT OF LIEN

Sec.

§ 3123. Direct liens; amount

The liens provided for in this chapter shall be direct liens, and shall be for the reasonable value of the labor, services, equipment, or materials furnished or for the price agreed upon by the claimant and the person with whom he contracted, whichever is less. Such lien shall not be limited in amount by the price stated in the contract as defined in Section 3088, except as provided in Sections 3235 and 3236.

§ 3124. Employee of contractor or subcontractor; filing of contract or modification as notice

In any case where the claimant was employed by a contractor or subcontractor, his claim of lien shall not extend to any labor, services, equipment, or materials not included in the contract between the owner and original contractor or any modification thereof, if the claimant had actual knowledge or constructive notice of the contract as defined

in Section 3088 or any such modification before he furnished such labor, service, equipment, or materials. The filing of a contract for a work of improvement or of a modification of such contract with the county recorder of the county where the property is situated, before the commencement of work, shall be equivalent to the giving of actual notice of the provisions thereof by the owner to all persons performing work or furnishing materials thereunder.

Article 5

PROPERTY SUBJECT TO LIEN

Sec.

§ 3128. Attachment to work and land; ownership interest

The liens provided for in this chapter shall attach to the work of improvement and the land on which it is situated together with a convenient space about the same or so much as may be required for the convenient use and occupation thereof, if at the commencement of the work or of the furnishing of the materials for the same, the land belonged to the person who caused such work of improvement to be constructed, but if such person owned less than a fee simple estate in such land then only his interest

therein is subject to such lien, except as provided in Section 3129.

§ 3129. Work done with knowledge of or at instance of owner, etc.; exception, notice of nonresponsibility

Every work of improvement constructed upon any land and all work or labor performed or materials furnished in connection therewith with the knowledge of the owner or of any person having or claiming any estate therein shall be held to have been constructed, performed, or furnished at the instance of such owner or person having or claiming any estate therein and such interest shall be subject to any lien recorded under this chapter unless such owner or person having or claiming any estate therein shall give a notice of nonresponsibility pursuant to Section 3094.

§ 3130. One claim against multiple improvements; designation of amount due on each; equitable distribution of lump sum contracts; claim against single structure on multiple parcels of land; distribution of liens

In every case in which one claim is filed against two or more buildings or other works of improvement owned or reputed to be owned by the same person or on which the claimant has been employed by the same person to do his work or furnish his materials, whether such works of improvement are owned by one or more owners, the person filing such claim must at the same time designate the amount due to him on each of such works of improvement; otherwise the lien of such claim is postponed to other liens. If such claimant has been employed to furnish labor or materials under a contract providing for a lump sum to be paid to him for his work or materials on such works of

improvement as a whole, and such contract does not segregate the amount due for the work done and materials furnished on such works of improvement separately, then such claimant, for the purposes of this section, may estimate an equitable distribution of the sum due him over all of such works of improvement based upon the proportionate amount of work done or materials furnished upon such respective works of improvement. The lien of such claimant does not extend beyond the amount designated as against other creditors having liens, by judgment, mortgage, or otherwise, upon either such works of improvement or upon the land upon which the same are situated.

For all purposes of this section, if there is a single structure on more than one parcel of land owned by one or more different owners, it shall not be the duty of the claimant to segregate the promotion of material or labor entering into the structure on any one of such parcels; but upon the trial thereof the court may, where it deems it equitable so to do, distribute the lien equitably as between the several parcels involved.

§ 3131. Separate residential units

If a work of improvement consists in the construction of two or more separate residential units, each such unit shall be considered a separate "work of improvement," and the time for filing claims of lien against each such residential unit shall commence to run upon the completion of each such residential unit. A separate residential unit means one residential structure, together with any garage or other improvements appurtenant thereto. The provisions of this qualification shall not impair any rights conferred under the provisions of Sections 3112 and 3130. Materials delivered to or upon any portion of such entire work of im-

provement or furnished to be used in such entire work of improvement and ultimately used or consumed in one of such separate residential units shall, for all the purposes of this title, be deemed to have been furnished to be used or consumed in the separate residential unit in which the same shall have been actually used or consumed; provided, however, that if the claimant is unable to segregate the amounts used on or consumed in such separate units, he shall be entitled to all the benefits of Section 3130.

Article 6

PRIORITIES

Sec.

§ 3134. Preference; knowledge of claimant; unrecorded encumbrances

The liens provided for in this chapter (other than with respect to site improvements) are, subject to the exception in Section 3138, preferred to any lien, mortgage, deed of trust, or other encumbrance upon the work of improvement and the site, which attaches subsequent to the commencement of the work of improvement, and also to any lien,

mortgage, deed of trust, or other encumbrance of which the claimant had no notice and which was unrecorded at the time of commencement of the work of improvement.

§ 3135. Site improvements as separate contract

If any site improvement is provided for in a separate contract from any contract with respect to the erection of residential units or other structures, then the site improvement shall be considered a separate work of improvement and the commencement thereof shall not constitute a commencement of the work of improvement consisting of the erection of any residential unit or other structure.

§ 3136. Advances by lender

A mortgage or deed of trust which would be prior to the liens provided for in this chapter to the extent of obligatory advances made thereunder in accordance with the commitment of the lender shall also be prior to the liens provided for in this chapter as to any other advances, secured by such mortgage or deed of trust, which are used in payment of any claim of lien which is recorded at the date or dates of such other advances and thereafter in payment of costs of the work of improvement. Such priority shall not, however, exceed the original obligatory commitment of the lender as shown in such mortgage or deed of trust.

§ 3137. Liens for site improvements

The liens provided for in Section 3112 with respect to site improvements are, subject to the exception in Section 3139, preferred to (a) any mortgage, deed of trust, or other encumbrance which attaches subsequent to the commencement of the site improvement work; and (b) any mortgage, deed of trust, or other encumbrance of which the claimant had no notice and which was unrecorded at the time of the

commencement of such site improvement; and (c) any mortgage, deed of trust, or other encumbrance recorded before the commencement of the site improvement work which was given for the sole or primary purpose of financing such site improvements, unless the loan proceeds are, in good faith, placed in the control of the lender under a binding agreement with the borrower to the effect that such proceeds are to be applied to the payment of claims of claimants and that no portion of such proceeds will be paid to the borrower in the absence of satisfactory evidence that all such claims have been paid or that the time for recording claims of liens has expired and no such claims have been recorded.

§ 3138. Payment bond procured by mortgagee or trustee; amount

If the holder of any mortgage or deed of trust which is subordinate pursuant to Section 3134 to any lien? shall procure a payment bond as defined in Section 3096 in an amount not less than 75 percent of the principal amount of such mortgage or deed of trust, which bond refers to such mortgage or deed of trust, and shall record such payment bond in the office of the county recorder in the county where the site is located, then such mortgage or deed of trust shall be preferred to all liens for labor, services, equipment, or materials furnished after such recording.

§ 3139. Payment bond procured by landowner, mortgagee or trustee on site improvement

If the owner of the land or holder of any mortgage or deed of trust, which is subordinate pursuant to Section 3137 to any lien, shall procure a payment bond in an amount not less than 50 percent of the principal amount of such mortgage or deed of trust and shall record such payment bond

in the office of the county recorder in the county where the site is located before completion of the work of improvement, then such mortgage or deed of trust shall be preferred to all such liens provided in Section 3112.

§ 3140. Recovery by original contractor or subcontractor

Any original contractor or subcontractor shall be entitled to recover, upon a claim of lien recorded by him, only such amount as may be due him according to the terms of his contract after deducting all claims of other claimants for labor, services, equipment, or materials furnished and embraced within his contract.

Article 7

ENFORCEMENT OF LIEN

Sec.

§ 3143. Surety bond; amount; release of lien; principal

If the owner of property, or the owner of any interest therein, sought to be charged with a claim of lien, or any original contractor or subcontractor disputes the correct-

ness or validity of any claim of lien, he may record in the office of the county recorder in which such claim of lien was recorded, either before or after the commencement of an action to enforce such claim of lien, a bond executed by a corporation authorized to issue surety bonds in the State of California, in a penal sum equal to 1½ times the amount of the claim or 1½ times the amount allocated in the claim of lien to the parcel or parcels of real property sought to be released, which bond shall be conditioned for the payment of any sum which the claimant may recover on the claim together with his costs of suit in the action, if he recovers therein. Upon the recording of such bond the real property described in such bond is released from the lien and from any action brought to foreclose such lien. The principal upon such bond may be either the owner of the property or the owner of any interest therein, or any original contractor, subcontractor, or sub-subcontractor affected by such claim of lien.

§ 3144. Duration of lien; extension if credit given; maximum time after completion

No lien provided for in this chapter binds any property for a longer period of time than 90 days after the recording of the claim of lien, unless within that time an action to foreclose the lien is commenced in a proper court, except that, if credit is given and notice of the fact and terms of such credit is recorded in the office of the county recorder subsequent to the recording of such claim of lien and prior to the expiration of such 90-day period, then such lien continues in force until 90 days after the expiration of such credit, but in no case longer than one year from the time of completion of the work of improvement.

§ 3145. Bona fide purchasers or encumbrancers

As against any purchaser or encumbrancer for value and in good faith whose rights are acquired subsequent to the expiration of the 90-day period following the recording of the claim of lien, no giving of credit or extension of the lien or of the time to enforce the same shall be effective unless evidenced by a notice or agreement recorded in the office of the county recorder prior to the acquisition of the rights of such purchaser or encumbrancer.

§ 3146. Lis pendens; notice

After the filing of the complaint in the proper court, the plaintiff may record in the office of the county recorder of the county, or of the several counties in which the property is situated, a notice of the pendency of such proceedings, as provided in Section 409 of the Code of Civil Procedure. Only from the time of recording such notice shall a purchaser or encumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action, and in that event only of its pendency against parties designated by their real names.

§ 3147. Limitation; dismissal

If the action to foreclose the lien is not brought to trial within two years after the commencement thereof, the court may in its discretion dismiss the same for want of prosecution.

§ 3148. Dismissal or judgment; effect

In all cases the dismissal of an action to foreclose the lien (unless it is expressly stated that the same is without prejudice) or a judgment rendered therein that no lien

exists shall be equivalent to the cancellation and removal from the record of such lien.

§ 3149. Consolidation of actions

Any number of persons claiming liens on the same property may join in the same action to foreclose their liens and when separate actions are commenced the court may consolidate them.

§ 3150. Costs

In addition to any other costs allowed by law, the court in an action to foreclose a lien must also allow as costs the money paid for verifying and recording the lien, such costs to be allowed each claimant whose lien is established, whether he be plaintiff or defendant.

§ 3151. Deficiency judgment

Whenever on the sale of the property subject to any liens provided for in this chapter, under a judgment of foreclosure of such lien, there is a deficiency of proceeds, judgment for the deficiency may be entered against any party personally liable therefor in like manner and with like effect as in an action for the foreclosure of a mortgage.

§ 3152. Personal actions; affidavit for attachment; judgment; credit for money collected

Nothing contained in this title shall be construed to impair or affect the right of any claimant to maintain a personal action to recover his debt against the person liable therefor either in a separate action or in the action to foreclose his lien, nor any right he may have to the issuance of a writ of attachment or execution. In his application

for a writ of attachment he shall refer to this section. Any lien held by the plaintiff under this chapter shall not affect his right to procure an attachment. The judgment, if any, obtained by the plaintiff in such personal action, or personal judgment obtained in such mechanic's lien action, shall not impair or merge any lien held by the plaintiff under this chapter, but any money collected on such judgment shall be credited on the amount of such lien.

§ 3153. Defense by contractor at own expense; withholding and deducting funds due contractor; recovery of judgment and costs by owner

In all cases where a claim of lien is recorded for labor, services, equipment, or materials furnished to any contractor, he shall defend any action brought thereon at his own expense, and during the pendency of such action the owner may withhold from the original contractor the amount of money for which the claim of lien is recorded. In case of judgment in such action against the owner or his property upon the lien, the owner shall be entitled to deduct from any amount then or thereafter due from him to the original contractor the amount of such judgment and costs. If the amount of such judgment and costs exceeds the amount due from him to the original contractor, or if he has settled with the original contractor in full, he shall be entitled to recover back from the original contractor, or the sureties on any bond given by him for the faithful performance of his contract, any amount of such judgment and costs in excess of the contract price, and for which the original contractor was originally the party liable.

STOP NOTICES FOR PRIVATE WORKS OF IMPROVEMENT

Article 1
APPLICATION OF CHAPTER

§ 3156. Application

The provisions of this chapter do not apply to any public work.

Article 2
WHO IS ENTITLED TO SERVE A STOP NOTICE AND BONDED STOP NOTICE

§ 3158. Persons authorized; notice to owner; failure to serve notice after demand by owner

Any of the persons named in Sections 3110, 3111, and 3112, other than the original contractor, may give to the

owner a stop notice. Any person who shall fail to serve such a stop notice after a written demand therefor from the owner shall forfeit his right to a mechanic's lien.

§ 3159. Persons authorized; notice to construction lender; payment bond

Any of the persons named in Sections 3110 and 3112, other than the original contractor, may, prior to the expiration of the period within which his claim of lien must be recorded under Chapter 2 (commencing with Section 3109), give to a construction lender a stop notice or a bonded stop notice unless a payment bond has previously been recorded in the office of the county recorder of the county where the site is located in accordance with Section 3235, except that the payment bond may be recorded at any time prior to the serving of the first stop notice. Such notice may only be given for materials, equipment, or services furnished, or labor performed. For the purposes of this section, where an owner undertakes construction on his own behalf, one who contracts with him for a portion of the work is a subcontractor and shall be entitled to give a stop notice.

Article 3
CONDITIONS TO VALID SERVICE OF STOP NOTICE AND BONDED STOP NOTICE

§ 3160. Effective service

Service of a stop notice or a bonded stop notice shall be effective only if the claimant:

(a) Gave the preliminary 20-day notice (private work) in accordance with the provisions of Section 3097 if required by that section; and

(b) Served his stop notice as defined in Section 3103 or his bonded stop notice as defined in Section 3083 prior to the expiration of the period within which his claim of lien must be recorded under Section 3115, 3116, or 3117.

Article 4

EFFECT OF STOP NOTICE AND BONDED STOP NOTICE

Sec.

§ 3161. Withholding of money by owner; payment bond

It shall be the duty of the owner upon receipt of a stop notice pursuant to Section 3158 to withhold from the original contractor or from any person acting under his authority and to whom labor or materials, or both, have been furnished, or agreed to be furnished, sufficient money due or to become due to such contractor to answer such claim and any claim of lien that may be recorded therefor, unless a payment bond has been recorded pursuant to the provisions of Section 3235, in which case the owner may, but is not obligated to, withhold such money.

§ 3162. Withholding of money by construction lender; payment bond

Upon receipt of a stop notice pursuant to Section 3159, the construction lender may, and upon receipt of a bonded stop notice the construction lender shall, withhold from the

borrower or other person to whom it or the owner may be obligated to make payments or advancement out of the construction fund, sufficient money to answer such claim and any claim of lien that may be recorded therefor, unless a payment bond has been recorded pursuant to the provisions of Section 3235 at any time prior to the serving of the first stop notice or bonded stop notice.

§ 3163. Objection to sufficiency of sureties; substitution of corporate surety bond

If the construction lender objects to the sufficiency of the sureties on the bond accompanying the bonded stop notice, he must give notice in writing of such objection to the claimant within 20 days after the service of the bonded stop notice. The claimant may within 10 days after the receipt of such written objection substitute for the initial bond a bond in like amount executed by a corporate surety licensed to write such bonds in the State of California. If the claimant fails to do so, the constuction lender may disregard the bonded stop notice and release all funds withheld in response thereto.

Article 5

PRIORITIES

Sec.

§ 3166. Assignment of funds; effect

No assignment by the owner or contractor of construction loan funds, whether made before or after a stop notice or

bonded stop notice is given to a construction lender, shall be held to take priority over the stop notice or bonded stop notice, and such assignment shall have no effect insofar as the rights of claimants who give the stop notice or bonded stop notice are concerned.

§ 3167. Pro rata distribution of funds

(a) If the money withheld or required to be withheld pursuant to any bonded stop notice shall be insufficient to pay in full the valid claims of all persons by whom such notices were given, the same shall be distributed among such persons in the same ratio that their respective claims bear to the aggregate of all such valid claims. Such pro rata distribution shall be made among the persons entitled to share therein without regard to the order of time in which their respective notices may have been given or their respective actions, if any, commenced.

(b) If the money withheld or required to be withheld pursuant to any stop notice shall be insufficient to pay in full the valid claims of all persons by whom such notices were given, the same shall be distributed among such persons in the same ratio that their respective claims bear to the aggregate of all such valid claims. Such pro rata distribution shall be made among the persons entitled to share therein without regard to the order of time in which their respective notices may have been given or their respective actions, if any, commenced.

§ 3168. Falsity of notice; effect

Any person who willfully gives a false stop notice or bonded stop notice or who willfully includes in his notice labor, services, equipment, or materials not furnished for the property described in such notice forfeits all right to participate in the pro rata distribution of such money

and all right to any lien under Chapter 2 (commencing with Section 3109).

Article 6

RELEASE OF STOP NOTICE OR BONDED STOP NOTICE

Sec.

§ 3171. Bond

If the owner, construction lender or any original contractor or subcontractor disputes the correctness or validity of any stop notice or bonded stop notice, he may file with the person upon whom such notice was served a bond executed by good and sufficient sureties in a penal sum equal to 1¼ times the amount stated in such notice, conditioned for the payment of any sum not exceeding the penal obligation of the bond which the claimant may recover on the claim, together with his costs of suit in the action, if he recovers therein. Upon the filing of such bond, the funds withheld to respond to the stop notice or bonded stop notice shall forthwith be released.

Article 7

ENFORCEMENT OF RIGHTS ARISING FROM STOP NOTICE AND BONDED STOP NOTICE

Sec.

§ 3172. Commencement of Actions; limitations

An action against the owner or construction lender to enforce payment of the claim stated in the stop notice or bonded stop notice may be commenced at any time after 10 days from the date of the service of the stop notice upon either the owner or construction lender and shall be commenced not later than 90 days following the expiration of the period within which claims of lien must be recorded as prescribed in Chapter 2 (commencing with Section 3109). No such action shall be brought to trial or judgment entered until the expiration of said 90-day period. No money shall be withheld by reason of any such notice longer than the expiration of such 90-day period unless such action is commenced. If no such action is commenced, such notice shall cease to be effective and such moneys shall be paid or delivered to the contractor or other person to whom they are due. Notice of commencement of any such action shall be given within five days after commencement thereof to the same persons and in the same manner as provided for service of a stop notice or bonded stop notice.

§ 3173. Dismissal; time

In case such action is commenced as provided in Section 3172 but is not brought to trial within two years after the commencement thereof, the court may in its discretion dismiss the action for want of prosecution.

§ 3174. Dismissal or judgment; effect

Upon the dismissal of an action to enforce a stop notice or bonded stop notice, unless expressly stated to be without prejudice, or upon a judgment rendered therein against the claimant, the stop notice or bonded stop notice shall cease to be effective and the moneys withheld shall be paid or delivered to the person to whom they are due.

§ 3175. Consolidation of Actions; impleading

Any number of persons who have given stop notices or bonded stop notices may join in the same action and when separate actions are commenced the court first acquiring jurisdiction may consolidate them. Upon the motion of the owner or construction lender the court shall require all claimants to the moneys withheld pursuant to stop notices and bonded stop notices to be impleaded in one action, to the end that the respective rights of all parties may be adjudicated therein.

Appendix D

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In The Supreme Court of The State of California

Connolly Development, Inc. and Union Bank, Petitioners, vs. Superior Court of Merced County, Respondent. Diamond International Corp., Real Party in Interest.	S.F. No. 23225

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that CONNOLLY DEVELOPMENT, INC. and UNION BANK, the petitioners herein, appeal to the Supreme Court of the United States from the

final judgment of the Supreme Court of the State of California, discharging alternative writs of mandate and prohibition issued by the Court of Appeal of the State of California, and denying peremptory writs, entered in this action on August 31, 1976, and modified September 29, 1976.

This appeal is taken pursuant to 28 United States Code Section 1257(2).

DATED: November 12, 1976

ORR, WENDEL & LAWLOR

By Eugene K. Lawlor
Eugene K. Lawlor
Attorneys for Petitioners

STATE OF CALIFORNIA }
County of Alameda } ss.

The undersigned hereby certifies that on November 12, 1976, she served the attached NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES on all parties by mailing it via first class mail, postage prepaid, addressed as follows:

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MARITA BRANAGH
Marita Branagh

Subscribed and sworn to before me
this 12th day of November, 1976

/s/ Donn L. Black (Seal)
Notary Public in and for said
County and State